Supreme Court, U.S.
FILED
97 1838 MAY 15 1998
OFFICE OF THE CLERK

No. 97-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

CARTER G. PHILLIPS *
MARK D. SCHNEIDER
STEPHEN F. SMITH
JEFFREY P. EHRLICH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ALAN Y. NAFTALIN
PETER M. CONNOLLY
KOTEEN & NAFTALIN, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 467-5700

Attorneys for Northeast Cellular Telephone Company, L.P.

* Counsel of Record

May 15, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

88 pp

QUESTIONS PRESENTED

1. Whether, under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the separation of powers inherent in Article III of the U.S. Constitution protects judicial judgments remanding a case to a lower tribunal for disposition in accordance with the law as declared by the higher court against *post hoc* legislative invalidation.

2. Whether the court of appeals correctly determined that the Paperwork Reduction Act Amendments of 1995, 44 U.S.C. § 3512(b), override 47 U.S.C. §§ 402(h), 405(a) and, notwithstanding *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), could be applied to revive a claim that was held to have been waived under prior law and required the Federal Communications Commission to rescind a cellular license awarded years before to a competing applicant.

STATEMENT REQUIRED BY RULE 29.6

Petitioner Northeast Cellular Telephone Company, L.P. ("Northeast") is a limited partnership comprised of a general partner, Maine State Cellular Telephone Co. ("MSCTC"), and two limited partners, Pine Tree Technology ("Pine Tree") and USCOC of Portland, Inc. ("USCOC-P"). Northeast has no subsidiaries.

MSCTC, which holds a 1% ownership interest in Northeast, is owned by PT and USCOC-P. MSCTC has no subsidiaries.

Pine Tree has a controlling interest (50.49%) in Northeast. Pine Tree is a closely held corporation controlled by Timothy D. Hutchison, and has no subsidiaries.

USCOC-P is a wholly owned subsidiary of United States Cellular Operating Co. ("USCOC") and holds a 48.51% ownership interest in Northeast. USCOC is a wholly owned subsidiary of United States Cellular Corp. ("USCC"). USCC is a publicly traded, non-wholly owned subsidiary of Telephone and Data Systems, Inc., which is also a publicly traded corporation. USCOC-P has no subsidiaries.

PARTIES

Northeast Cellular Telephone Company, L.P. is the petitioner in this case.

The respondents in this case are the Federal Communications Commission and Portland Cellular Partnership, intervenor below. In addition, Saco River Cellular, Inc., appellant and intervenor below, is named as a respondent pursuant to this Court's Rule 12.6.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.6	ii
PARTIES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
Procedural Background	3
Decision of the Court of Appeals	10
REASONS FOR GRANTING THE PETITION	13
I. THIS COURT SHOULD DECIDE WHETHER THE SEPARATION OF POWERS INHERENT IN ARTICLE III PROTECTS JUDICIAL JUDGMENTS REMANDING A CASE TO A LOWER TRIBUNAL AGAINST LEGISLATED INVALIDATION, AN IMPORTANT QUESTION THAT HAS DIVIDED THE CIRCUITS	14
A. The First Circuit Has Squarely Rejected The D.C. Circuit's Sweeping Ruling That Decisions Remanding A Case Are Never "Final" Under Article III And Thus Can Be Overturned At The Whim Of Congress	15
B. The D.C. Circuit's Decision Below Is Contrary To Controlling Decisions Of This Court Concerning The Finality Of Judgments That Include A Remand	18

TABLE OF CONTENTS—Continued

Page

C. The D.C. Circuit's Unprecedented Decision To Engraft A "Remand" Exception Onto Article III Threatens The Independence Of This Court And The Federal Judiciary As A Whole In Nonconstitutional Cases 21

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE PROPER APPLICATION OF THE PRESUMPTION AGAINST RETROACTIVITY TO CHANGES IN PROCEDURAL LAW 22

A. There Is Widespread Confusion Among The Circuits On The Proper Analysis Under *Landgraf* Of Procedural Changes As Applied To Pending Cases 23

B. The D.C. Circuit's Ruling That Section 3512(b) Is Merely Prospective In This Case, Even Though PortCell's PRA Claim Had Already Been Adjudicated As Waived Under Prior Procedural Law, Is Contrary To Controlling Decisions Of This Court 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES — Page

Axel Johnson Inc. v. *Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993) 17
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 22
Chenault v. *United States Postal Serv.*, 37 F.3d 535 (9th Cir. 1994) 24
Covino v. *Reopel*, 89 F.3d 105 (2d Cir. 1996), cert. denied sub nom. *Vann* v. *Darden*, 117 S. Ct. 1265 (1997) 23
DIRECTV, Inc. v. *FCC*, 110 F.3d 816 (D.C. Cir. 1997) 26
Elramly v. *INS*, 131 F.3d 1284 (9th Cir. 1997) (per curiam) 17, 18
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 18
Herrera v. *United States*, 96 F.3d 1010 (7th Cir. 1996), cert. denied, 118 S. Ct. 1326 (1998) 24
Hughes Aircraft Co. v. *United States, ex rel. Schumer*, 117 S. Ct. 1871 (1997) ..... *passim*
Johnston v. *CIGNA Corp.*, 14 F.3d 486 (10th Cir. 1993) 17
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) ..... *passim*
Lindh v. *Murphy*, 117 S. Ct. 2059 (1997) 22, 23
Northeast Cellular Tel. Co. v. *FCC*, 897 F.2d 1164 (D.C. Cir. 1990) ..... *passim*
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) ..... *passim*
Shipes v. *Trinity Indus.*, 31 F.3d 347 (5th Cir. 1994) 24
United States v. *Lopez*, 100 F.3d 113 (10th Cir. 1996) 24
United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 20
United States v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998) 15, 16, 17
Viacom Inc. v. *Ingram Enters., Inc.*, Nos. 97-1950 & 97-2330, 1998 WL 169790 (8th Cir. Apr. 14, 1998) 24

TABLE OF AUTHORITIES—Continued

Page

Wright v. *Morris*, 111 F.3d 414 (6th Cir.), cert. denied, 118 S. Ct. 263 (1997) 24

CONSTITUTION, STATUTES, AND RULE

U.S. Const. art. III, § 1 ..... 3, 14, 19
28 U.S.C. § 2101(c) 5, 19, 21
Paperwork Reduction Act, 44 U.S.C. §§ 3501 *et seq.* 6
44 U.S.C. § 3507(a) 6
§ 3512(a) 6, 10
§ 3512(b) 9, 10, 22
47 U.S.C. § 308(b) 4
§ 402(h) 5, 6, 19
§ 402(j) 5, 11, 19, 21
§ 405(a) 6, 7, 28

FEDERAL AGENCY DECISIONS

Portland Cellular Partnership, 9 FCC Rcd. 3291 (1994) 7, 28
Portland Cellular Partnership, 8 FCC Rcd. 4146 (1993) 6, 7, 8, 28
Portland Cellular Partnership, 6 FCC Rcd. 2283 (1991) 5, 6, 20
Portland Cellular Partnership, 4 FCC Rcd. 2050 (1989) 4

FEDERAL REGULATIONS

47 C.F.R. § 1.1210 (1997) 8
§ 22.917(b)(1) (1986) 4
§ 22.917(b)(1)(i) (1986) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-———

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Northeast Cellular Telephone Company, L.P. ("Northeast") respectfully requests that a writ of certiorari issue to review the decision of the court of appeals in this matter, which has been stayed pending certiorari.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 133 F.3d 25, and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App."), beginning at page 1a. The unpublished orders of the court of appeals staying its judgment pending certiorari over respondents' objections and denying rehearing of its decision on the merits appear at pages 18a and 20a of the Appendix, respectively. The decision of the Federal Communications Commission ("FCC"), retroactively rescinding petitioner's cellular telephone license and granting, *nunc pro tunc,* the competing applica-

tion of Portland Cellular Partnership ("PortCell"), is published at 11 FCC Rcd. 19997, and appears at Pet. App. 24a.

JURISDICTIONAL STATEMENT

The court of appeals entered its opinion and judgment on January 16, 1998. The court denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on March 19, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law involved in this case are reproduced in the Constitutional and Statutory Appendix hereto, beginning at Pet. App. 48a.

STATEMENT OF THE CASE

This case presents the Court with a direct challenge to federal judicial autonomy and to the weighty interest of individual citizens in not having their rights and obligations altered by retroactive legislation. The legal issues could not be more poignantly posed than here, where one litigant, Northeast, won its case in the D.C. Circuit with a definitive ruling that the application of its opponent, PortCell, for the cellular license for Portland, Maine, had to be dismissed because of PortCell's unquestioned failure to comply with the requirements of federal law promulgated by the FCC. Northeast then received the license from the FCC, and twice the FCC rejected PortCell's untimely efforts to circumvent the D.C. Circuit's judgment under existing law. Northeast built and continuously operated this system until PortCell succeeded in smuggling seemingly innocuous language into the Paperwork Reduction Act in 1995. The effect of the new legislation, under the holding below, was to permit PortCell to sweep aside the D.C. Circuit's prior judgment and the subsequent FCC orders complying with that judgment. Consequently, Northeast's license has been stripped away and awarded to PortCell, based solely on the 1995 legislation.

It would be difficult to find a case that better illustrates why retroactive application of new statutes is so disfavored under our Constitution and the American legal tradition. The rule against retroactivity embodies a profound hostility to providing "special opportunities for the powerful to obtain special and improper legislative benefits." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 267 n.20 (1994) (citing *The Federalist No. 44*, at 301 (James Madison) (J. Cooke ed. 1961)). Similarly, the unfair ability of politically powerful parties to secure "legislative interference with [adverse] private judgments of the courts" led the Framers "to separate the legislative from the judicial power." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995). Both of these concerns are squarely implicated here, for PortCell has obtained from Congress *post hoc* legislation extending to it a valuable benefit—a cellular telephone license—to which it not only was not entitled under prior law, but had been denied in compliance with an undisturbed judgment of the D.C. Circuit. Moreover, the court below has undermined the independence of the federal judiciary by giving Congress free rein, in violation of the separation of powers embodied in Article III, to revise nonconstitutional judicial decisions that result in a remand to a lower tribunal. Accordingly, this case provides an ideal vehicle for the Court to decide the important and recurring questions of law presented herein.

Procedural Background

1. In May 1986, the Federal Communications Commission conducted a lottery to determine which of five applicants would be awarded the right to construct and operate a cellular telephone system for Block B in Portland, Maine. On June 24, 1986, the FCC named Portland Cellular Partnership ("PortCell"), a general partnership consisting of three of the five applicants, including NYNEX (one of the giant regional Bell Operating Companies and a Fortune 100 corporation), as the "tentative selectee," ahead of Saco River Cellular, Inc. and Northeast. This meant that if PortCell was found to have met the various

legal requirements for receipt of a license, its application would be granted, and the other applications denied.

According to Congress and the FCC, one essential prerequisite to receipt of a license is a "firm financial commitment." Under then-Section 22.917(b)(1) of the Commission's rules, PortCell was required to "obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system." 47 C.F.R. § 22.917(b)(1) (1986); see also 47 U.S.C. § 308(b) (applicants "shall" set forth their financial qualifications). Well before the Portland lottery was conducted, the FCC had clearly delineated what was necessary to satisfy the financial commitment requirement. Among other things, an applicant relying on a letter of credit had to reach agreement on the terms and conditions of the prospective loan. 47 C.F.R. § 22.917(b)(1)(i) (1986).

Ignoring Justice Holmes' sage admonition that "[m]en must turn square corners when they deal with the Government," *Rock Island, Ark. & La. R.R.* v. *United States,* 254 U.S. 141, 143 (1920), PortCell presented only a single letter from NYNEX Credit Company, which plainly demonstrated that PortCell had not satisfied the financial qualifications requirement. See *Portland Cellular Partnership*, 4 FCC Rcd. 2050, 2050-51 (1989) (ruling that PortCell's financial qualification showing was "defective" in two respects). Incredibly, however, the Commission, on its own motion, waived the firm financial commitment requirement long deemed necessary by the FCC to promote the public interest, and affirmed the grant of PortCell's application, based solely on the FCC's "lengthly [sic] experience in dealing with NYNEX Corporation and its various subsidiaries and affiliates." *Id.* at 2051. Northeast appealed.

In 1990, the D.C. Circuit vacated the Commission's "outrageous" decision as "arbitrary and capricious," and thus violative of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Northeast Cellular Tel. Co.* v. *FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990). Noting

that "[t]here is no question here that Port Cell has failed to comply strictly with [the FCC's financial commitment] regulations" (*id.* at 1166), the court ruled that the Commission's decision was unlawful because it "was not based on any rational waiver policy" and that, "given the record in this case, we cannot imagine any standard that would have justified a waiver of the filing of PortCell's financial qualifications." *Id.* at 1165. In remanding the case, the court unequivocally instructed the Commission that unless the record then in existence contained certain specified information pertaining to NYNEX's credit practices, which it is undisputed that the existing record did not contain, "the FCC *must* disqualify Port Cell's application." *Id.* at 1167 (emphasis added).

The FCC and PortCell could have sought certiorari in this Court, but neither did so. As such, they necessarily elected to acquiesce in the panel's decision. This decision accordingly became final 90 days later when the time for seeking certiorari expired. See 28 U.S.C. § 2101(c); see also 47 U.S.C. § 402(j). Because the FCC and PortCell had acquiesced in the court of appeals' unquestionably correct ruling that agencies cannot arbitrarily waive stated requirements as to favored parties while holding other parties to those requirements, the case was then returned to the Commission, which was statutorily required promptly to dispose of the case in accordance with the law declared in *Northeast*. See 47 U.S.C. § 402(h) (on remand from a reviewing court "it shall be the duty of the Commission" to "carry out the judgment of the court," and to do so "forthwith").

On remand, the Commission confirmed the obvious—that its prior waiver could not be justified on the existing record except as a preferential accommodation for politically powerful NYNEX—and therefore dismissed PortCell's application as directed by *Northeast*. *Portland Cellular Partnership*, 6 FCC Rcd. 2283 (1991). Accordingly, having dismissed both PortCell and (on unrelated grounds) Saco River (*id.* at 2284), the Commission

designated Northeast, controlled by a small, closely held independent telephone company and its principal, Timothy D. Hutchison, as the tentative selectee for the Portland license. See *id.* at 2285 n.8.

One year later, on April 29, 1992, PortCell filed an untimely petition for reconsideration, asking the Commission to reinstate its license. See 47 U.S.C. § 405(a) (petitions for reconsideration of a FCC order must be filed within 30 days). There, for the first time in this entire proceeding, PortCell challenged the financial qualifications rule and the dismissal of its application a year earlier as violative of the Paperwork Reduction Act, 44 U.S.C. §§ 3501 *et seq.* ("PRA"). The PRA precludes federal agencies from "conduct[ing] or support[ing] the collection of information" from private parties unless prior approval has been obtained from the Office of Management and Budget ("OMB"). *Id.* § 3507(a). "Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with" an unauthorized collection of information. *Id.* § 3512(a). PortCell argued that because the Commission lacked OMB approval for the firm financial commitment rule in 1986, it could not disqualify PortCell based on its undisputed failure to comply with the rule, even though the substantive rule had been approved by OMB in March 1990, one year before the rule was ultimately applied to PortCell.

Observing that PortCell's petition for reconsideration was filed "nearly a year after the 30-day deadline for such petitions set forth in Section 405 of the Communications Act," the Commission—albeit after a wholly unjustifiable delay that was flatly inconsistent with Section 402(h)'s command that the Commission must act "forthwith" on remand from a reviewing court, 47 U.S.C. § 402(h)—denied PortCell's petition for reconsideration in 1993. *Portland Cellular Partnership*, 8 FCC Rcd. 4146, 4146 n.4 (1993). In that order, the Commission also granted Northeast's application. *Id.* at 4152. Amazingly, PortCell yet again sought reconsideration, frivolously challenging

the financial qualifications rule on the same PRA grounds that the Commission had properly rejected under Section 405(a) as untimely. As before, the Commission refused to entertain that untimely claim, acknowledging that PortCell's request "conflict[ed] with the [D.C. Circuit's] instruction in *Northeast Cellular*." *Portland Cellular Partnership*, 9 FCC Rcd. 3291, 3292 n.3 (1994).

In compliance with the requirement to begin service that was embodied in the Commission's ruling, Mr. Hutchison and Northeast constructed a state-of-the-art cellular telephone system in Portland at a cost in excess of $10 million. Mr. Hutchison and Northeast have served the Portland cellular market ever since, now providing more than 15,000 subscribers with the high quality service that Northeast (and Northeast alone) had proven itself financially and otherwise qualified to provide in accordance with FCC rules. Northeast continues, even to this day, to upgrade that system at substantial effort and expense to meet growing demand and to ensure continued first-rate service to its subscribers.

In taking all of these steps, Mr. Hutchison and Northeast acted secure in the knowledge that, based on a variety of undisturbed rulings in this proceeding, PortCell's application for the Portland license was no longer in contention. These were: (1) the court of appeals' 1990 ruling in *Northeast* that "the FCC must disqualify Port Cell's application" unless a waiver of the financial qualifications requirement could be justified on the prior record, a possibility the court itself "could not imagine" (897 F.2d at 1167); (2) the FCC's undisputed 1991 ruling on remand from *Northeast* that the prior waiver granted to PortCell could not be so justified and that *Northeast* thus compelled dismissal of PortCell's application, 6 FCC Rcd. at 2284; and (3) the FCC's two subsequent rulings that PortCell's belated PRA challenges to the dismissal of its application were waived because they had not been raised within Section 405(a)'s 30-day period for seeking reconsideration of FCC orders. 9 FCC Rcd. at 3291 (1994); 8

FCC Rcd. at 4146 n.4 (1993). The basic question presented by this case, therefore, is whether Congress could, after the fact, sweep all of these rulings aside and throw out of business a party who, at every juncture, fulfilled all of the FCC's requirements, in favor of a party who not only plainly failed to comply with an existing substantive FCC rule but also failed to preserve any PRA challenge to that rule.

2. Realizing that, in light of the foregoing, its PRA claim was dead before the Commission and beyond all hope of resurrection on appeal, PortCell circumvented the judicial process by seeking a cure from Congress for its self-inflicted wound. Unbeknownst to Mr. Hutchison and Northeast, PortCell began an intense lobbying campaign in Congress. All the while, Mr. Hutchison and Northeast were busy operating the cellular telephone system PortCell so coveted, without any reason to suspect that the prior rulings in its favor were about to be cast aside by Congress.

In response to PortCell's one-sided pleas for assistance, then-Senator William Cohen of Maine pressured the FCC to reinstate PortCell's application. On January 15, 1995, Cohen wrote a letter to then-FCC Chairman Reed Hundt that, in Cohen's words, " 'urge[d] his prompt consideration of . . . whether the FCC complied with the Paperwork Reduction Act' " in dismissing PortCell's application. Pet. App. 41a (quoting Cohen letter). Even though they were self-evidently intended to overturn the FCC's award of the Portland cellular license to Northeast, these communications were made *ex parte* and were hidden from Northeast until disclosed by Commission staff.

PortCell, however, did not stop with *ex parte* contacts, which are expressly forbidden by law in the context of a comparative licensing proceeding before the FCC. See 47 C.F.R. § 1.1210 (1997). To the contrary, PortCell used NYNEX's considerable clout on Capitol Hill to acquire nothing short of a statutory change that could be used to force the FCC to disregard the *Northeast*

decision, as well as its prior rulings that PortCell's PRA claim had been waived and the statutory basis for those rulings. Soon, PortCell got what it had lobbied so hard to obtain.

Congressman Crapo, of Idaho, acting on behalf of NYNEX and PortCell, tacked onto an existing bill a new piece of legislation (one sentence in length) that became 44 U.S.C. § 3512(b). Section 3512(b) provides, in full: "The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." *Id.* No hearings were held, and no Committee Report was prepared on the amendment. There is no indication that any Member of Congress other than the House and Senate sponsors who did PortCell's bidding ever considered the question whether the amendment would apply to cases pending prior to its enactment, nor did the provision incorporate language even remotely similar to that previously deemed necessary by this Court to justify application of a new law to pending cases. See *Landgraf*, 511 U.S. at 260 (citing as example of clearly retroactive statute a provision stating that a law " 'shall apply to all proceedings pending on or commenced after the date of the enactment of this Act' "). Instead, the provision simply became law effective October 1, 1995, along with the numerous other provisions in the omnibus bill in which Section 3512(b) was buried.

3. Armed with its new legislation, PortCell returned to the Commission to take its third bite at the apple on its PRA-based challenge to the 1991 dismissal of its application. On October 11, 1995, *four years* after its application had been dismissed and *one year* after Northeast completed construction of its own cellular system and began serving subscribers in Portland, PortCell moved to reinstate its application on PRA grounds, citing Section 3512(b) as removing the procedural bar to that claim. The FCC, having previously waived the financial qualifications rule *sua sponte* in order to grant the Portland

license to PortCell based on its familiarity with NYNEX, granted PortCell's motion. Pet. App. 24a-47a.

Even the Commission recognized that "strong policy reasons" existed for not entertaining PortCell's untimely and twice-rejected PRA claim (Pet. App. 30a), for to do so would produce harsh results and would totally undermine the goals of procedural regularity and administrative efficiency. Nevertheless, the FCC took the position that Section 3512(b) tied its hands, brushing aside well-supported arguments for interpreting the new statute as not applicable in this case. On the merits of PortCell's legislatively revived PRA claim, the FCC agreed that because the financial qualifications rule was not approved by OMB until after PortCell's application was submitted, Section 3512(a) of the PRA precluded dismissal of that application on financial qualifications grounds. *Id.* at 38a.

Consequently, in what can only be described as an amazing and outrageous turn of events, the FCC "rescind[ed] the grant of the application of Northeast" and "reinstate[d] *nunc pro tunc* and grant[ed] the application of Port[Cell]." Pet. App. 24a. The FCC granted Northeast interim operating authority that "will terminate ten days after Port Cell serves notice" that it is ready to begin service. *Id.* The Commisssion refused to stay its order pending appeal, but the court of appeals promptly issued a stay over the objection of the FCC and PortCell. *Saco River Cellular, Inc.* v. *FCC*, No. 91-1248 (D.C. Cir. Mar. 10, 1997) (per curiam).

Decision of the Court of Appeals

4. Northeast presented the following two bases for reversal, among others:

First, Northeast argued that applying Section 3512(b) to revive PortCell's procedurally defaulted PRA claim would violate the well-established rule that statutes will not be given retroactive effect unless their language contains an "express command" compelling that result.

See generally *Landgraf* v. *USI Film Prods.*, 511 U.S. at 265-73. Section 3512(b) was retroactive as applied to this case because PortCell's PRA claim had *already* been adjudged by the Commission (on two separate occasions) to have been waived under Section 405(a) prior to enactment of Section 3512(b) in 1995. By lifting that complete bar to PortCell's PRA claim, thereby stripping Northeast of a valid defense under prior law to PortCell's PRA challenge, Section 3512(b) plainly had impermissible retroactive effect under *Landgraf*. See, *e.g.*, *Hughes Aircraft Co.* v. *United States, ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997). As even the Commission agreed in its order (Pet. App. 33a), nothing in the text of Section 3512(b) addresses (much less "expressly commands") application of the statute to cases that were pending prior to its enactment.

Second, Northeast argued that even if Section 3512(b) could somehow be applied to this case consistent with *Landgraf* and its progeny, the separation-of-powers doctrine inherent in Article III precludes application of the statute. Under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), once the judgment of a lower federal court becomes "final" in the constitutional sense, which occurs upon exhaustion of (or expiration of the time for pursuing) appellate remedies on direct review (*id.* at 227), that judgment is constitutionally immune from revision or invalidation based on later-enacted statutes. In 1990, the *Northeast* decision, pointedly instructing the FCC that it "*must* disqualify Port Cell's application" absent specified findings that indisputably could not be made based on the prior record (897 F.2d at 1167) (emphasis added), achieved that protected status when the 90-day period for seeking certiorari elapsed. By retroactively overriding this authoritative judicial instruction in 1995—which is explicitly denominated as "final" by statute, see 47 U.S.C. § 402(j), and which the FCC had long since complied with on remand—Section 3512(b) deprived *Northeast* of the dispositive effect to which it was constitutionally entitled.

5. The D.C. Circuit rejected each of these contentions and, in a sweeping published opinion, affirmed the FCC order in all respects. Pet. App. 1a-17a.

a. The court of appeals first considered Northeast's *Landgraf* argument. Ignoring the fact that PortCell's PRA claim had been adjudged waived under Section 405(a) not just once, but *twice*, prior to enactment of Section 3512(b), the court held that Section 3512(b) "does not offend any norm against retroactive lawmaking." Pet. App. 10a. To the court, Section 3512(b) merely "requires that, from October 1, 1995 onward, agencies and courts entertain arguments that would otherwise have been barred either by a statute of limitations or by the proponent's failure to have made the argument at an earlier stage in the administrative or judicial process." *Id.* at 9a. The court's response to Section 405(a), the prior legal basis for the Commission's previous refusals to entertain PortCell's untimely PRA claim, was terse: "§ 3512 'simply trumps Section 405(a).'" *Id.* (quoting 11 FCC Rcd at 20003). Although the court thus recognized that Section 3512(b) stripped Northeast of a statutory defense to the PRA claim, it made no attempt to reconcile its decision with this Court's holding in *Hughes* that such a statute operates retroactively and thus is subject to *Landgraf*'s presumption against retroactivity. See 117 S. Ct. at 1878.

b. Having construed the statute in a manner that retroactively eviscerated *Northeast*, the court of appeals was required to consider the separation-of-powers issue. On that issue, the court held that notwithstanding the contrary definition of finality given in *Plaut*, only a "final judgment terminating the case" is constitutionally protected against subsequent legislative abrogation. Pet. App. 11a. *Northeast* did not qualify as such, the court ruled, because it had "remanded [the case] to the Commission for further proceedings." *Id.* The court made no attempt to reconcile its ruling that a remand necessarily strips a judgment of finality under Article III with this Court's

holding in *Plaut* that a decision is "final," for Article III purposes, when it is no longer subject to direct review in higher courts (see 514 U.S. at 214 & 227), nor did the court address Section 402(j), which explicitly denominates as "final" appeals court decisions reversing and remanding FCC decisions. See 47 U.S.C. § 402(j). Accordingly, the court affirmed the Commission's order. Pet. App. 16a-17a.

6. Upon the denial of its petition for rehearing and suggestion for rehearing *en banc* on March 19, 1998, Northeast moved for a stay pending certiorari. Both the FCC and PortCell opposed the motion. On April 17, 1998, the court of appeals stayed its judgment pending certiorari in this Court. Pet. App. 18a-19a. Because this petition for certiorari was filed within 30 days of the issuance of the stay, it will remain in effect pending final action by this Court on the petition. See D.C. Cir. R. 41(a)(2).

REASONS FOR GRANTING THE PETITION

This case presents compelling reasons for this Court to intervene in this proceeding that has gone awry as a result of brazen, *post hoc* interference by Congress in a contested adjudicative proceeding. Based on subsequent legislation procured by PortCell, using the political clout of one of the Nation's largest corporations, the court below swept aside a whole host of final court and administrative decisions that had culminated in an award of the Portland cellular license to Northeast years before the effective date of Section 3512(b). Consequently, absent intervention by this Court, a party who complied with all existing requirements for the receipt of a license, and constructed a cellular system at great expense in order to provide service under that license, will be thrown out of business due to a competing applicant's ability to obtain from Congress legislation changing the rules after the game between Northeast and PortCell had been played.

In endorsing this fundamentally unjust result, the court of appeals rode roughshod over two time-honored legal protections against retroactive legislation. The first is that

once the federal court system has adjudicated a case before it, thereby fixing the rights and obligations of the parties, Congress cannot, by subsequent legislation, overturn (or compel the courts to overturn) that adjudication. See *Plaut*, 514 U.S. at 218-19. The second is that new laws, whether substantive or procedural, are presumed not to apply where the relevant event regulated by the law has already occurred. See *Landgraf* v. *USI Film Prods.*, 511 U.S. at 265-73. By departing from these bedrock principles of law, which provide essential protection to the citizen against unfair and potentially vindictive legislation, the extraordinary decision of the court below adopted a crabbed interpretation of this Court's precedents that has been rejected by other Circuits and that is itself contrary to controlling decisions from this Court. Accordingly, a writ of certiorari should issue to review the extraordinary decision of the court of appeals in this case.

I. THIS COURT SHOULD DECIDE WHETHER THE SEPARATION OF POWERS INHERENT IN ARTICLE III PROTECTS JUDICIAL JUDGMENTS REMANDING A CASE TO A LOWER TRIBUNAL AGAINST LEGISLATED INVALIDATION, AN IMPORTANT QUESTION THAT HAS DIVIDED THE CIRCUITS.

The court of appeals' ruling that Section 3512(b) required it to depart from its decision in *Northeast Cellular Telephone Co.* v. *FCC*, 897 F.2d 1164 (D.C. Cir. 1990), raises a grave constitutional question concerning the independence of the federal courts. As this Court has ruled, it is "deeply rooted in our law" that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that a judgment conclusively resolves the case because a 'judicial Power' is one to render dispositive judgments." *Plaut*, 514 U.S. at 218-19 (quoting Art. III) (internal quotation marks omitted). "Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. . . . Having achieved finality, however,

a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy[.]" *Id.* at 227. Once the line of finality is crossed, therefore, Article III interposes a "structural safeguard" to judicial autonomy that does not tolerate "the Legislature's nullifying prior, authoritative judicial action." *Id.* at 239 (emphasis omitted).

The court of appeals held that its own 1990 decision in *Northeast*, directing the FCC to disqualify PortCell's application given the undisputed absence of any basis in the record for a waiver of the financial qualifications rule, was not protected under Article III against legislative abrogation. The court reasoned that the protection of Article III applies only to a judgment that "terminat[es] the case" as a whole, leaving no other related proceedings pending in any court or administrative agency. Pet. App. 11a. By definition, the court held, *Northeast* was not such a judgment because it "remanded [the case] to the Commission for further proceedings." *Id.* This unprecedented ruling is contrary both to decisions of other Circuits and to controlling decisions of this Court.

A. The First Circuit Has Squarely Rejected The D.C. Circuit's Sweeping Ruling That Decisions Remanding A Case Are Never "Final" Under Article III And Thus Can Be Overturned At The Whim Of Congress.

In a recent decision, the First Circuit squarely rejected the view adopted by the court below—namely, that federal court decisions are not "final" under *Plaut* as long as proceedings on remand to a lower tribunal are contemplated, Pet. App. 11a. See *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998).

1. In that case, the court of appeals considered the effect of a post-remand statute on a decision by the court at an earlier stage of the proceedings. In a prior appeal, the court of appeals reviewed a district court's decision to enhance a carjacker's sentence because the defendant had committed a rape during the carjacking. The district court

concluded that, even without proof of physical or mental trauma, the rape itself showed that the victim had suffered "serious bodily injury," which is a ground for an enhanced sentence under 18 U.S.C. § 2119(2). The First Circuit vacated and remanded for resentencing, concluding that a rape, without more, does not constitute "serious bodily injury" under the statutory definition. *Vazquez-Rivera*, 135 F.3d at 173-74. The United States did not seek certiorari, but rather introduced evidence on remand of physical and mental trauma that the victim suffered as a result of the rape.

While the case was pending before the district court, the Carjacking Correction Act of 1996, Pub. L. No. 104-217, 110 Stat. 3020, was passed for the avowed purpose of overturning the appellate court's ruling. The Act amended the prior definition of "serious bodily injury" to include any conduct constituting "sexual abuse." The district court ruled that the additional evidence required by the prior decision of the court of appeals was unnecessary in light of the new statute, which it deemed "applicable to [the defendant's] remanded sentencing." 135 F.3d at 175. The First Circuit disagreed, holding that, in light of its ruling in the prior appeal, the new statute could not constitutionally be applied to the defendant under *Plaut*.

In an opinion by Chief Judge Torruella, the court began by noting that a retroactive increase in the punishment an offender faced for prior criminal conduct would violate the Ex Post Facto Clause. *Id.* at 177. The government responded by arguing that the new statute merely "clarified" the intent of the original statute, and thus did not actually increase the defendant's sentencing range under prior law. *Id.* That argument, the court ruled, merely pointed to another constitutional violation—namely, a violation of *Plaut*. *Id.*

Even though its prior decision remanded the case for resentencing, the First Circuit held that its prior decision was "final" and, as such, constitutionally protected against legislative abrogation under Article III. *Id.* The court explained:

> Painting black lines on the sides of a horse and calling it a zebra does not make it one. Similarly, labeling the 1996 amendment a "clarification" of Congress's intent in the original law is legally irrelevant. In the first appeal of this case, this court decided what Congress's intention was when it enacted the original statute. "Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was."

Id. (quoting *Plaut,* 514 U.S. at 227) (citation omitted). Accordingly, the court held it was "required to consider the new factual record in the light of our interpretation of Section 2119(2), *before it was amended in 1996.*" *Id.* (emphasis added).

In light of *Vazquez-Rivera*, there is a square Circuit split on whether appellate decisions remanding a case for further proceedings are "final" under *Plaut* where all avenues of direct appeal have been completed or forgone. The D.C. Circuit clearly ruled that they are not—that a remand necessarily strips the judgment of the constitutional protection it would otherwise enjoy. Pet. App. 11a. The First Circuit reached the opposite result, properly joining other Circuits in adhering to the definition of finality adopted in *Plaut*. See *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) (holding that "a case remains 'pending,' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse"); see also, *e.g.*, *Johnston* v. *CIGNA Corp.*, 14 F.3d 486, 489 n.4 (10th Cir. 1993) (same).

2. Consistent with *Vazquez-Rivera*, at least one other Circuit, while rejecting a *Plaut* challenge on other grounds, applied *Plaut* to a judgment that included a remand. See *Elramly* v. *INS*, 131 F.3d 1284 (9th Cir. 1997) (per curiam) (judgment remanding immigration case to Board

of Immigration Appeals). Unlike the court of appeals in this case, *Elramly* gave no weight whatsoever to the fact of the remand in determining whether the prior ruling was final under Article III. To the contrary—and quite properly—it analyzed the finality of a judgment containing a remand as it would any other judgment for Article III purposes, *i.e.*, under the definition of finality given in *Plaut* itself. *Id.* at 1285 (holding that " 'judgments from which all appeals have been forgone or completed' . . . are final and protected from the effects of new legislation") (quoting *Plaut*, 514 U.S. at 227). This Court should grant certiorari to resolve these conflicts among the Circuits, which directly implicate the independence of the federal judiciary.

B. The D.C. Circuit's Decision Below Is Contrary To Controlling Decisions Of This Court Concerning The Finality Of Judgments That Include A Remand.

The court of appeals made no attempt to reconcile its sweeping ruling that a judgment cannot be final under Article III if it includes a remand with applicable decisions of this Court, and for good reason.

1. Although one could not determine it from the opinion of the court below, *Plaut* itself provides the relevant definition of "final judgments." The Court in *Plaut* adopted the definition of finality enunciated in *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987): "By 'final,' we mean a case in which . . . the time for a petition for certiorari elapsed or a petition for certiorari [was] finally denied." See 514 U.S. at 214 (citing this passage from *Griffith*). It was especially appropriate to look to *Griffith* for the definition of finality because that case, like *Plaut* itself, dealt with the extent to which new rules of federal law can be applied to overturn prior judgments. See *Griffith*, 479 U.S. at 716 (holding that new judicial rulings as to matters of criminal procedure apply to all cases still open to, or pending on, direct review). The *Griffith* definition of finality, however, is more than a concept imported from another area of law; rather, *Plaut* deemed it "implicit in what Article III creates: not a batch of

unconnected courts, but a judicial department composed of 'inferior Courts' and 'one Supreme Court.'" 514 U.S. at 227 (quoting U.S. Const. art. III, § 1).

Plaut held that Article III draws "a distinction between judgments from which all appeals have been foregone or completed"—that is, "final" judgments—"and judgments that remain on appeal (or subject to being appealed)"—that is, non-final judgments. *Id.* at 227. Given that the time for seeking certiorari from *Northeast* expired in 1990, see 28 U.S.C. § 2101(c), that decision is plainly a judgment of the first variety. Any doubt on the score is dispelled by the fact that once the *Northeast* mandate issued, the case left the federal court system altogether and was returned to the FCC for compliance with the court's mandate, plainly indicating that *Northeast* was indeed "the last word of the judicial department" on the fate of PortCell's fatally flawed application. *Plaut*, 514 U.S. at 227. As such, *Northeast* is entitled under *Plaut* to protection against subsequent legislative abrogation.

Plaut provides another clear basis, in the FCC context, for rejecting the court of appeals' conclusion that a court decision remanding a matter necessarily is not final in the constitutional sense. The *Plaut* Court explicitly held that "[f]inality of a legal judgment is determined by statute." *Id.* Thus, instead of fashioning its own preferred definition of "finality," the court of appeals should have looked to the Communications Act to determine whether *Northeast* is a final decision. Had it done so, it would have discovered that the Act itself expressly denominates as "final" a court judgment reversing an order of the FCC and remanding a case to the Commission. See 47 U.S.C. § 402(j). Moreover, the Act specifically provides that on remand from such a judgment, "it shall be the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto." *Id.* § 402(h). The court of appeals, therefore, not only flouted this Court's decision in *Plaut*—it usurped the role of Congress in delineating what classes of cases are open for authoritative resolution by the federal courts.

2. The court of appeals, in an apparent attempt to distinguish *Plaut*, noted that *Northeast* "did not purport to resolve" the PRA issues reopened by the Commission on remand (Pet. App. 11a)—a fact, incidentally, attributable to PortCell's own lack of due diligence. The panel's statement, though technically true, is irrelevant to the question at hand.

The "law" declared by *Northeast* was both clear and unequivocal—unless the prior record revealed a reasonable, non-preferential basis for waiver of the financial qualifications requirement, "the FCC *must* disqualify Port Cell's application." 897 F.2d at 1167 (emphasis added). As the Commission itself recognized on remand (6 FCC Rcd. at 2284), that clear instruction did not leave the Commission free to conjure up alternative grounds for salvaging PortCell's application, which was incurably flawed *ab initio*. Rather, the D.C. Circuit's instruction in *Northeast* compelled the Commission to dismiss PortCell's fatally infirm application, given the state of the record. It is this judicial judgment—which, like other court judgments, is entitled to full *res judicata* effect, barring not only claims that were presented, but also claims that could have been presented—that has been retroactively abrogated by Section 3512(b). This is precisely the result forbidden by *Plaut* and Article III.

Lacking any other colorable basis in *Plaut* for its ruling, the panel sought refuge in "the rule, which the Supreme Court acknowledged in *Plaut* itself, that 'each court, at every level, must decide [cases] according to existing laws.'" Pet. App. 11a (quoting *Plaut*, 514 U.S. at 227 (in turn quoting *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). This rule is plainly inapposite. *Schooner Peggy* was a case pending on direct appellate review from a lower court when the law changed, see 5 U.S. (1 Cranch) at 110; consequently, as *Plaut* itself noted, the rule of *Schooner Peggy* is limited to "judgments *still on appeal* that were rendered before the law was enacted." 514 U.S. at 226 (emphasis added). *Northeast*, by contrast, was no longer on or subject to

direct appellate review, and thus became "final" under *Plaut*, once the 90-day period for seeking certiorari expired in 1990. See 28 U.S.C. § 2101(c); see also 47 U.S.C. § 402(j). The contrary holding of the court of appeals is simply unsupportable under *Plaut*.

C. The D.C. Circuit's Unprecedented Decision To Engraft A "Remand" Exception Onto Article III Threatens The Independence Of This Court And The Federal Judiciary As A Whole In Nonconstitutional Cases.

The panel's decision to engraft onto Article III a "remand" exception has broad implications for the institutional integrity of the federal court system. If the panel's view is sustained, a significant part—and perhaps even a majority—of the *corpus juris* will be subject to after-the-fact legislative abrogation in the very cases in which they were rendered because comparatively few appellate adjudications result in a simple affirmance or reversal that "terminat[es] the case," as the panel requires. Pet. App. 11a.

This is especially true of this Court itself, which routinely leaves the proper disposition of the entire case to the courts of appeals, and therefore commonly remands after deciding the question on which it granted certiorari. Under the exceedingly narrow view of *Plaut* adopted below, a question of statutory interpretation decided by this Court could be retroactively overturned by Congress in the *same* litigation in which the Court rendered it, as long as some aspect of the case remained pending on remand (or otherwise) in the lower courts or in an administrative agency. Needless to say, this result hardly bodes well for the institutional independence of this Court and would leave the handiwork of this Court (and all other federal courts) in nonconstitutional cases subject to being rendered merely advisory, contrary to Article III. Accordingly, the Court should grant certiorari to address these far-reaching implications for this Court and for the federal judicial system as a whole.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE PROPER APPLICATION OF THE PRESUMPTION AGAINST RETROACTIVITY TO CHANGES IN PROCEDURAL LAW.

The court of appeals also eviscerated an independent safeguard against retroactive lawmaking—the familiar presumption that statutes do not apply retroactively. This Court "ha[s] frequently noted, and just recently reaffirmed, that there is a 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence.'" *Hughes Aircraft Co.* v. *United States, ex rel. Schumer,* 117 S. Ct. 1871, 1876 (1997) (quoting *Landgraf,* 511 U.S. at 265). This entrenched rule of law rests on the view that "settled expectations should not be lightly disrupted" through retroactive applications of new statutes changing the law. *Landgraf,* 511 U.S. at 265. More to the point here, the rule reflects the recognition, articulated at the time of the Founding by James Madison, that retroactive legislation "offer[s] special opportunities for the powerful to obtain special and improper legislative benefits." *Id.* at 267 n.20 (citing *The Federalist No. 44,* at 301 (J. Cooke ed. 1961)). "Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988); see also *Lindh* v. *Murphy,* 117 S. Ct. 2059, 2062 (1997) (*Landgraf* "reaffirm[ed] that clear-statement rule").

The court of appeals did not (and could not) find that Section 3512(b) satisfied the clear-statement rule of *Landgraf.* As the FCC correctly conceded in its order, without contravention by the court below, "the statute itself does not explicitly address th[e] question" whether it applies to cases pending before its enactment. Pet. App. 33a. This concession was wise indeed because all Section 3512(b) does is indicate when, in a given proceeding, a PRA claim can be raised (*i.e.*, "at any time during the agency administrative process or judicial action applicable thereto," 44 U.S.C. § 3512(b)); it does *not* indicate at all (much less *clearly* indicate) to what class of proceedings

(pre- or post-enactment) it applies. See *Lindh*, 117 S. Ct. at 2064 n.4 (presumption against retroactivity satisfied only by "statutory language" that is "so clear that it could sustain only one interpretation"). Thus, the decisive question is whether Section 3512(b) is "retroactive" as applied to revive PortCell's previously rejected PRA challenge to the 1991 dismissal of its application. The holding of the court below that Section 3512(b) is not retroactive conflicts not only with this Court's decisions in *Landgraf* and *Hughes*, but also with the decisions of several other Circuits.

A. There Is Widespread Confusion Among The Circuits On The Proper Analysis Under *Landgraf* Of Procedural Changes As Applied To Pending Cases.

The Circuits are divided on the proper application of the presumption against retroactivity under *Landgraf* to newly enacted procedural rules. The dispute centers upon two statements in *Landgraf*: (1) "Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity" (511 U.S. at 275); and (2) "Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case," for it is "commonsense" that "the applicability of [new procedural] provisions ordinarily depends on the posture of the particular case." *Id.* at 275 n.29.

The Second Circuit has flatly refused to follow the second of the foregoing principles from *Landgraf*. See *Covino* v. *Reopel*, 89 F.3d 105, 108 (2d Cir. 1996) (holding that *Landgraf*'s discussion of that principle "is offered in dictum, far removed from the holding of *Landgraf*"), cert. denied sub nom. *Vann* v. *Darden*, 117 S. Ct. 1265 (1997). The court below was not as forthright as *Covino*—it simply ignored the relevant part of *Landgraf*, adhering instead to a constricted reading of *Landgraf* that was repudiated in *Hughes*. Pet. App. 10a. At least one other Circuit has pointedly rejected *Covino* and concluded that the discussion of procedural rules in *Landgraf* "is instruc-

tive of the Supreme Court's views and cannot be dismissed out of hand," adding that the discussion, "which eight Justices endorsed, carries more weight than much of the *Landgraf* analysis, which commanded a bare majority." *Wright* v. *Morris*, 111 F.3d 414, 419 (6th Cir.), cert. denied, 118 S. Ct. 263 (1997); cf. *Viacom Inc.* v. *Ingram Enters., Inc.*, Nos. 97-1950 & 97-2330, 1998 WL 169790, *2 (8th Cir. Apr. 14, 1998) ("[W]e will not brush aside as dicta the Supreme Court's pronouncement," which "is part of a carefully crafted holding on retroactivity that is binding on this court.").

Moreover, in a variety of statutory contexts, other courts of appeals have squarely adopted petitioner's view that under *Landgraf* newly enacted procedural rules cannot be applied to cases where prior procedures have already been applied. For example, as the Fifth Circuit explained in upholding an order denying expert witness fees that had been entered prior to enactment of a fee-shifting provision of the Civil Rights Act of 1991: "[T]he Court [in *Landgraf*] indicated that when a procedural matter has been properly decided under the old rule, and a new procedural rule is subsequently enacted while the ultimate resolution of the case is still pending, no reversal is required." *Shipes* v. *Trinity Indus.*, 31 F.3d 347, 349 (5th Cir. 1994); see also, *e.g.*, *United States* v. *Lopez*, 100 F.3d 113, 116-17 (10th Cir. 1996); *Herrera* v. *United States*, 96 F.3d 1010, 1011-12 (7th Cir. 1997) (Easterbrook, J.) (holding that under *Landgraf* a statute is retroactive if it "alter[s] the effect of procedural steps completed before its enactment"), cert. denied, 118 S. Ct. 1326 (1998). Similarly, the Ninth Circuit, in a decision cited with approval by this Court in *Hughes*, 117 S. Ct. at 1878, has ruled that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme." *Chenault* v. *United States Postal Serv.*, 37 F.3d 535, 537-39 (9th Cir. 1994); *contra* Pet. App. 9a (ruling that application of Section 3512(b) is not barred under *Landgraf* although the statute "requires that . . . agencies and courts entertain arguments

that would otherwise have been barred either by a statute of limitations or by the proponent's failure to have made the argument at an earlier stage").

Although the Circuit decisions involved different statutes, they each addressed an important, recurring question of law that is squarely presented here—namely, the extent to which subsequent changes in procedure can be applied, consistent with the presumption against retroactivity, to pending cases in which prior procedures have already been applied. These other Circuits correctly recognize that procedural rules have forbidden retroactive effect under *Landgraf* where, as here, prior procedures have already been applied in a given case. The court of appeals below, by contrast, took the opposite view, deeming changes in procedures to be prospective only as long as the case remains pending. Pet. App. 9a-10a.

In one sense, it is hardly surprising that this divergence of opinion has materialized as to the proper application of *Landgraf* to changes in procedural law. In *Landgraf* itself, Justice Scalia, joined by Justices Kennedy and Thomas, explicitly noted the need for further guidance from this Court on that important question. See 511 U.S. at 290-91 (Scalia, J., concurring in judgment) (criticizing as "ill-defined" the Court's stated exception to its declaration that changes in procedure often operate prospectively only). Nothing has occurred in the years since *Landgraf* to dispel the confusion on this question presaged in Justice Scalia's concurrence. In light of the continuing need for authoritative guidance from this Court on the proper analysis of new procedural laws under *Landgraf*, the Court should grant certiorari to consider that much-debated and frequently litigated question.

B. The D.C. Circuit's Ruling That Section 3512(b) Is Merely Prospective In This Case, Even Though PortCell's PRA Claim Had Already Been Adjudicated As Waived Under Prior Procedural Law, Is Contrary To Controlling Decisions Of This Court.

The court of appeals concluded that even though PortCell's claim was dead in this litigation long before PortCell and NYNEX won enactment of Section 3512(b) in 1995, Section 3512(b) is merely "prospective" as applied in this case and thus is not subject to the rule of *Landgraf* (Pet. App. 9a-10a). This conclusion is flatly contrary to this Court's decisions in *Hughes Aircraft Co.* v. *United States, ex rel. Schumer*, 117 S. Ct. 1871 (1997), and *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994).

1. The court of appeals, relying on *Landgraf*'s broad-brush illustration of certain ways in which legislation can potentially operate retroactively (511 U.S. at 269 n.23), concluded that application of Section 3512(b) is not impermissibly retroactive. The court held that Section 3512(b) "does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" Pet. App. 10a (quoting *Landgraf*, 511 U.S. at 280). This exceedingly narrow interpretation of *Landgraf*, limiting the presumption against retroactivity to cases where one of the foregoing effects has occurred, was entirely consistent with the D.C. Circuit's prior decision (written by the same author) in *DIRECTV, Inc.* v. *FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997), where the court even more explicitly held that a statute is retroactive only if it has one of the three effects enumerated in *Landgraf*. The notion that *Landgraf* and the law's presumption against retroactivity are so limited, however, was squarely (and unanimously) rejected by this Court in *Hughes*.

In *Hughes*, this Court explained that such a narrow view of the presumption "simply misreads our opinion in *Landgraf*." 117 S. Ct. at 1876. The Court observed that

the language from *Landgraf* invoked by the panel as a limitation on the presumption "does not purport to define the outer limit of impermissible retroactivity." *Id.* Instead, *Landgraf* "merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." *Id.* Therefore, contrary to the panel, it was not at all fatal to Northeast's claim that Section 3512(b) assertedly did not operate in one of the three ways described in *Landgraf*.

2. The myopic focus of the court of appeals on the foregoing statement in *Landgraf*, in addition to being flatly inconsistent with *Hughes*, led the court to overlook that part of *Landgraf* that plainly supports petitioner's retroactivity argument. *Landgraf* held (and eight Justices agreed) that a procedural rule would have forbidden retroactive effect if applied to a case in which the prior procedural rule has already been applied. See, *e.g.*, *Landgraf*, 511 U.S. at 275 n.29 ("A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial."); see also *id.* at 291-92 (Scalia, J., concurring in judgment) (where event regulated by "procedural rule" has already occurred prior to enactment of new procedural rule, the new rule "would unquestionably not be applied"). Once that point in a particular proceeding has been reached, and prior procedures applied in a particular case, it is "commonsense" that the parties have "reliance interests in matters of procedure" and therefore are entitled to the protection of the presumption against retroactivity. *Id.* at 275 & n.29.

The Court relied on this analysis in holding that the presumption barred application of a new, concededly procedural rule (*i.e.*, that Title VII plaintiffs are entitled to a jury trial) to pending cases in which bench trials had already been conducted. *Id.* at 281 n.34. Thus, *Landgraf*

clearly holds that even procedural rules can run afoul of the anti-retroactivity rule where, as here, the old procedural rule had already been applied in a particular case by the time the new procedural rule was enacted. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. at 229 (explaining that under *Landgraf* once procedural rules governing "pleading and proof . . . have been applied in a case," any change in those rules is retroactive in that case, and thus may not be applied unless "the statute clearly so requires," even if the case remains pending) (citing *Landgraf*, 511 U.S. at 275 n.29).

This case involves precisely the situation addressed in *Landgraf*—where old procedural rules are applied in a case, followed by enactment of a fundamentally different procedural rule. The *prior* procedural rule—the one in existence the first two times PortCell belatedly raised, and the FCC rejected, its PRA defense—did not require the Commission to consider an untimely PRA defense. See 47 U.S.C. § 405(a). Not just once, but *twice*, the Commission applied this longstanding statutory rule of procedure to PortCell prior to enactment of Section 3512(b), and both times declined to entertain PortCell's untimely PRA defense. See 9 FCC Rcd. at 3292; 8 FCC Rcd. at 4146 n.4.

Because its PRA claim was indeed dead under the old procedural rule previously applied in this proceeding by the FCC, PortCell circumvented the judicial process and successfully lobbied certain Members of Congress to tack onto another piece of legislation a provision creating a new procedural rule—Section 3512(b)—that might be read as resuscitating its previously waived (and twice-rejected) PRA claim. This time, acting under the *newly enacted* procedural rule, the Commission reversed course, considering itself "required to consider" PortCell's twice-rejected PRA argument "at this late stage." Pet. App. 30a. In affirming that decision, the court of appeals "agree[d] with the Commission that § 3512 'simply

trumps Section 405(a).'" Pet. App. 9a. In doing so, the court necessarily (albeit unwittingly) acknowledged that Section 3512 ushered in a profound—indeed, *outcome-determinative*—after-the-fact change in the procedural landscape applicable to this proceeding. The presumption against retroactivity exists for the very purpose of preventing the dislocation and unfairness that, as this case so poignantly illustrates, often results from such changes in law.

* * * *

In sum, this case presents precisely the sort of abrupt shift in law, sweeping away reliance interests grounded in adjudications based on prior law, that Article III and the presumption against retroactivity have served for centuries to prevent. As a result of heavy lobbying behind closed doors, a politically powerful entity was able to secure enactment of a statute that, as the court put it, "trumps" its own prior decision in Northeast's favor and the very rule of law that had properly been applied to PortCell's PRA claim. The result of Congress' *post hoc* lawmaking could hardly be more inequitable—a party who has, at every juncture, played (and ultimately *won*) the lottery game by the FCC's rules is suddenly rendered a loser, and forced to surrender a valuable government franchise in which it has invested heavily, simply because the rules were dramatically changed *after* the game between Northeast and PortCell had been played. This Court should grant certiorari to resolve the decisional conflicts identified above and to ensure that the protections of Article III and the presumption against retroactivity are not rendered utterly meaningless.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS *
MARK D. SCHNEIDER
STEPHEN F. SMITH
JEFFREY P. EHRLICH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ALAN Y. NAFTALIN
PETER M. CONNOLLY
KOTEEN & NAFTALIN, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 467-5700

Attorneys for Northeast Cellular Telephone Company, L.P.

May 15, 1998

* Counsel of Record

APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 30, 1997 Decided January 16, 1998

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P. AND
PORTLAND CELLULAR PARTNERSHIP
Intervenors

Consolidated with
Nos. 93-1423, 96-1439

Appeals from Orders of the
Federal Communications Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Alan Y. Naftalin argued the cause for appellant Northeast Cellular Telephone Company, L.P., with whom *Peter M. Connolly, Carter G. Phillips* and *Stephen F. Smith* were on the briefs.

Theresa Fenelon argued the cause for appellant Saco River Cellular, Inc., with whom *Harold J. Carroll* was on the briefs.

Laurence H. Schecker, Counsel, Federal Communications Commission, argued the cause for appellee, with whom *William E. Kennard*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Roberta L. Cook*, Counsel, were on the brief. *John E. Ingle*, Deputy Associate General Counsel, and *Renee Licht*, Counsel, entered appearances.

Anne M. Lobell, Counsel, U.S. Department of Justice, argued the cause for amicus curiae United States of America, with whom *Frank W. Hunger*, Assistant Attorney General, U.S. Department of Justice, *Mary Lou Leary*, U.S. Attorney, *Marleigh D. Dover*, Special Counsel, U.S. Department of Justice, and *Richard A. Olderman, Attorney*, were on the brief

Alan Y. Naftalin, Peter M. Connolly, Mark D. Schneider and *Michael A. Nemeroff* were on the brief for intervenor Northeast Cellular Telephone Company, L.P. *Herbert D. Miller, Jr.* entered an appearance.

Theresa Fenelon and *Harold J. Carroll* were on the brief for intervenor Saco River Cellular, Inc.

L. Andrew Tollin and *Michael Duele Sullivan* were on the brief for intervenor Portland Cellular Partnership. *Charles D. Ossola* and *Michael B. Barr* entered appearances.

Before: EDWARDS, *Chief Judge*, and GINSBURG and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: Appellants Saco River Cellular, Inc. and Northeast Cellular Telephone Co., L.P., applicants for a license to provide cellular telephone service in the Portland, Maine area, challenge a series of decisions by the Federal Communications Commission culminating in the award of the license to Portland Cellular Partnership (PortCell). In the most recent decision under review, the Commission concluded that the 1995 amendments to the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, required it to reinstate PortCell's application, which it had previously dismissed, and consequently to award the license to PortCell. We agree that the 1995 amendments to the PRA obligated the Commission to reconsider its dismissal of PortCell's application. Accordingly, we affirm the agency order awarding the license to PortCell and dismiss as moot Saco River's challenge to the Commission's handling of its application.

I. BACKGROUND

In 1986 the Commission held a lottery for a license to offer cellular phone service in the Portland area. Seacoast Cellular, Inc. placed first among five applicants, followed by Saco River, Community Services Telephone Co., Northeast, and NYNEX Mobile Communications Co. Shortly thereafter Seacoast amended its application to substitute PortCell, a general partnership the original partners of which were Seacoast, NYNEX Mobile, and Community, as the winning applicant. (The current partners are Seacoast, NYNEX Mobile, and Lewiston-Auburn Cellular.)

Saco River and Northeast, the remaining two applicants, objected that PortCell was ineligible for a license because it had failed to "obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system and amend its application to so demonstrate," as required by 47 C.F.R. § 22.917(b)(1) (1986). The regulation then in force provided that:

> The firm financial commitment . . . shall be from a recognized bank or other financial institution and shall evidence the lender's determination that it has assessed the creditworthiness of the loan applicant and that it is committed to providing the necessary financing, including any actions required of the applicant to continue the commitment in force. Applicants obtaining financing from other than a recognized lending institution must submit proof that the financing entity has such funds available and uncommitted to another cellular application.

47 C.F.R. § 22.917(b)(1)(i) (1986). As evidence of the financial commitment it had obtained, PortCell submitted a letter of credit from NYNEX Credit Corp.

In 1989 the Commission agreed with Saco River and Northeast that PortCell's application was defective to the extent that the letter of credit did not include the terms of the proposed loan and failed to indicate that NYNEX Credit had assessed PortCell's creditworthiness. Nonetheless, the Commission waived the firm-financial-commitment requirement and granted the license to PortCell on the basis of the Commission's "lengthy [sic] experience in dealing with NYNEX Corporation and its various subsidiaries and affiliates." *Portland Cellular Partnership*, 4 FCC Rcd 2050, 2051 (1989).

In 1990 this court vacated that decision as arbitrary and capricious because the waiver of the firm-financial-commitment requirement "was not based on any rational waiver policy." *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1167. Upon remand the Commission, finding that it could not justify the waiver, dismissed PortCell's application as defective. *Portland Cellular Partnership*, 6 FCC Rcd 2283 (1991).

The Commission also dismissed Saco River's application as defective because Saco River's proposed service contour extended beyond the Portland service area. The Commis-

sion determined that, because the proposed extension involved more than *de minimis* encroachments into adjacent service areas, Saco River would not be permitted to amend its filing to bring it into compliance with the applicable rules. *Id.* at 2284.

With PortCell and Saco River no longer in the running, the Commission designated Northeast as the tentative selectee. *Id.* Community filed a timely motion to reconsider. Nearly a year later PortCell filed its own petition to reconsider, arguing for the first time that the Commission had erred in dismissing its application because the firm-financial-commitment reporting requirement had not been approved by the Office of Management and Budget. The Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, provides that "[a]n agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information . . . the Director [of the OMB] has approved the proposed collection of information." 44 U.S.C. § 3507(a). The Commission responded that it had no authority to consider PortCell's petition because the petition was filed too late. *Portland Cellular Partnership*, 8 FCC Rcd 4146, 4146 n.4 (1993).

In 1993 the Commission denied Community's petition for reconsideration, *id.* at 4149-50, and granted Northeast's application over the objections of Saco River and PortCell, *id.* at 4150-52. PortCell filed a timely petition for reconsideration of the grant of Northeast's application. In addition, PortCell and Community filed petitions for further reconsideration of the dismissal of PortCell's application, with PortCell again raising its PRA objection.

In 1994 the Commission denied PortCell's and Community's petitions for further reconsideration of the order dismissing PortCell's application. In a somewhat different analysis than it had offered when it first denied PortCell's petition for reconsideration, the Commission explained that, because Community's original rehearing petition had been timely, the agency was free upon reconsidera-

tion thereof to entertain any relevant argument, including the PRA argument in PortCell's untimely petition. The Commission then declined to exercise its discretion to consider PortCell's "grossly untimely" PRA objection because

> Port Cell's failure to avail itself of this argument when its compliance with [the Commission's] financial qualifications rule was first called into question imposed a particularly heavy burden on the resources of the court, the Commission and the other parties . . . litigating the issue of Port Cell's compliance.

Portland Cellular Partnership, 9 FCC Rcd 3291, 3292 (1994). Meanwhile, the Commission deferred reconsideration of its grant of Northeast's application, *id.* at 3291 n.2, and Northeast constructed a cellular system that has been operating in the Portland market since November 1994.

In 1995 the Congress added subsection (b) to the "public protection" provision of the PRA. The amended version provides:

> (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if—
>
> > (1) the collection of information does not display a valid control number assigned by the Director [of the OMB] in accordance with this chapter; . . . .
>
> (b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

44 U.S.C. § 3512. PortCell then filed yet another petition for reconsideration, this time asserting that § 3512 (b) requires the Commission to consider its PRA argument.

In 1996 the Commission agreed that because the administrative proceedings were still ongoing, the amended statute required it to consider PortCell's PRA defense. The Commission then determined that it had violated the PRA by dismissing PortCell's application on the basis of an unapproved request for information about financial commitments. *Portland Cellular Partnership,* 11 FCC Rcd 19997, 20001-06 (1996). Accordingly, the Commission allowed PortCell to amend its application to satisfy the firm-financial-commitment requirement, and PortCell submitted a 1995 letter of credit from Fleet Bank of Maine. Although this financial showing did not illuminate what commitment, if any, PortCell had obtained as of the time of its selection in 1986, the Commission accepted PortCell's amendment in satisfaction of the firm-financial-commitment requirement. The Commission thereupon rescinded its grant of the license to Northeast and awarded the license to PortCell. *Id.* at 20013. Upon the motion of Northeast, this court stayed the Commission's 1996 order pending judicial review.

Both Northeast and Saco River appealed. Because Saco River placed second behind PortCell in the lottery for the Portland license, however, we need consider Saco River's challenge to the dismissal of its application only if we determine that the Commission erred in awarding the license to PortCell.

II. ANALYSIS

Northeast presents six arguments why the Commission erred when it revoked Northeast's license to serve the Portland market: (1) the Communications Act prevents the Commission from considering PortCell's belated argument invoking the PRA; the Commission's application of § 3512(b) of the PRA to this case (2) is an impermissible retroactive application of the new statute, and (3) reverses this court's 1990 decision in *Northeast v. FCC,* in violation of the separation-of-powers doctrine; (4) the lack of an OMB control number does not excuse Port-

Cell's failure to comply with the statutory requirement to submit information to the Commission; (5) the OMB approved the firm-financial-commitment rule before it was "enforced" against PortCell; and (6) the firm-financial-commitment requirement is a substantive requirement for a license, not merely a collection of information. For the reasons detailed below, we reject all these arguments and affirm the Commission's 1996 order.

A. Did § 3512 Require the Commission to Consider PortCell's PRA Defense?

In the order under review the Commission acknowledged that "strong policy reasons" counseled against considering PortCell's PRA defense. 11 FCC Rcd. at 20001. The Commission believed that it was required to do so, however, because it understood the 1995 amendments to the PRA as allowing any adversely affected person "to raise PRA violations without limitation, so long as the administrative or judicial process in connection with a particular license or with a particular application continues." *Id.* at 20003. We agree with that reading of the Act as amended.

1. The Communications Act

According to Northeast, the Commission violated §§ 402(h) and 405(a) of the Communications Act when it considered PortCell's PRA defense. Section 402(h) requires the Commission, after a case has been remanded by this court, to give effect to our judgment "upon the basis of the proceedings already had and the record upon which [the] appeal was heard and determined." 47 U.S.C. § 402(h). Section 405(a) establishes a 30-day deadline for filing petitions for reconsideration. 47 U.S.C. § 405 (a). The Commission responded to Northeast's argument as follows:

> We are not waiving the financial qualification requirements for licenses in contravention of the court's

> mandate. Instead, we are considering whether the financial qualification requirement regulation is valid and enforceable under the PRA. Section 402(h) does not restrict us from doing so. In any event, Section 3512 of the PRA . . . overrides any restriction 402 (h) might place on our consideration of PRA issues in a proceeding on remand from a court.

11 FCC Rcd at 20005.

We need not address today what restrictions §§ 402 (h) and 405(a) of the Communications Act impose when § 3512 of the PRA is not invoked. Because § 3512 of the PRA applies by its terms "notwithstanding any other provision of law," we agree with the Commission that § 3512 "simply trumps Section 405(a) and, to the extent it might be relevant, Section 402(h)." *Id.* at 20003; *see Liberty Maritime Corp. v. United States,* 928 F.2d 413, 416 (D.C. Cir. 1991) (similar "notwithstanding" clause "supercede[s] all other laws").

2. Retroactivity

Northeast argues that applying the PRA amendments to this case contravenes the principle that retroactivity is not favored in the law. As we recently noted, however, in determining whether a statute has retroactive effect it is necessary "to examine the temporal relationship between the statute and the activity the statute is meant to govern." *Legal Assistance for Vietnamese Asylum Seekers v. Department of State,* 104 F.3d 1349, 1352 (D.C. Cir. 1997). Section 3512(b) requires that, from October 1, 1995 onward, agencies and courts entertain arguments that would otherwise have been barred either by a statute of limitations or by the proponent's failure to have made the argument at an earlier stage in the administrative or judicial process. In this case, the Commission had dismissed PortCell's PRA defense as untimely without ruling upon the merits of it; the PRA amendments merely re-

quired the Commission, when the issue was raised anew, to make that ruling. Because § 3512(b) governs only the conduct of litigation after the effective date of the statute and does nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking.

Nor is a statute retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). By permitting parties to raise the PRA issue 'at any time' in ongoing proceedings, the statute does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Rather, it simply prevents an agency or court from refusing to consider a PRA argument on the ground that it is untimely.

We conclude that the Commission correctly interpreted the amended statute as requiring it to consider PortCell's PRA defense when that defense was raised in the ongoing proceedings upon remand.

3. Separation of powers

Northeast argues that even if § 3512(b) can be applied to ongoing proceedings in other circumstances, its application in this case would effectively reverse our decision in *Northeast v. FCC*, in violation of the separation-of-powers doctrine as the Supreme Court interpreted it in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *Plaut* was a sequel to *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350 (1991), in which the Court had announced a new statute-of-limitations rule for certain securities fraud suits. The Congress had responded to the *Lampf, Pleva* decision by passing a law purporting to revive suits that had been dismissed in the wake of *Lampf*,

Pleva, but the Court held in *Plaut* that, as an attempt by the Congress to reopen a final judgment, the new law was unconstitutional. 514 U.S. at 225. According to Northeast, application of § 3512(b) in this case would likewise nullify this court's determination in *Northeast*, which became final when PortCell failed to seek review in the Supreme Court, that the Commission "must disqualify" PortCell's application if the agency could adduce no rational waiver policy to support it. 897 F.2d at 1167.

Plaut is no bar to the application of § 3512 to the present case, however, because no party in *Northeast* raised, and we did not purport to resolve, the PRA issue. Nor did we render a final judgment terminating the case; rather we remanded it to the Commission for further proceedings. For the Commission and the court to apply § 3512 to this case after October 1, 1995, therefore, is merely to follow the rule, which the Supreme Court acknowledged in *Plaut* itself, that "each court, at every level, must 'decide according to existing laws.' " 514 U.S. at 226 (quoting *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801)).

B. Did the Commission Violate the PRA?

The public protection provision of the PRA provides that "no person shall be subject to any penalty for failing to comply with a collection of information" that lacks a currently valid OMB control number. 44 U.S.C. § 3512 (a). When PortCell filed its application, the Commission had not obtained OMB approval for the firm-financial-commitment filing requirement then codified at 47 C.F.R. § 22.917(b) (1986). Therefore, to the extent that § 22.917(b) mandated a collection of information, the Commission could not lawfully penalize PortCell for failing to comply with it.

Northeast makes three arguments for the proposition that § 3512 of the PRA does not prevent the Commission

from punishing PortCell for failing to comply with § 22.917(b): First, the mandate to demonstrate a firm financial commitment originated with the Congress (as opposed to the Commission); therefore PortCell was obligated to comply with the filing requirement regardless of the Commission's failure to comply with the PRA. Second, the Commission's failure to comply with the PRA was at most harmless error because the Commission had obtained an OMB control number for § 22.917(b) by the time it penalized PortCell. Third, § 22.917(b) is a substantive legal requirement rather than a "collection of information" requirement. For the reasons set out below, we reject these three arguments and conclude that the Commission was obliged, as it held, to permit PortCell to amend its application in order to demonstrate that it had complied with § 22.917(b).

1. Statutory obligation

Northeast contends that the requirement that an applicant demonstrate a firm financial commitment is a statutory obligation and therefore not subject to the PRA. The OMB's regulations clearly state that § 3512 "does not preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed . . . by statute," 5 C.F.R. 1320.6(e), and we shall assume that is a reasonable interpretation of the law.

As the OMB has explained, however, that principle "does not extend to situations in which a statute authorizes, or directs, an agency to impose a collection of information on persons, and the agency does so." Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act, 60 Fed. Reg. 30438, 30441 (1995). That is all that has happened here. Section 308(b) of the Communications Act provides that "[a]ll applications for station licenses . . . shall set forth such facts as the Commission

by regulation may prescribe as to the . . . financial . . . qualifications of the applicant to operate the station." 47 U.S.C. § 308(b). The Commission duly required that each applicant submit information showing that it had a firm financial commitment. There is no collection of information imposed by statute, much less a specific congressional command to provide information showing a firm financial commitment. The Congress merely authorized, it did not require, the Commission to collect information regarding the financial qualifications of applicants for a license. Accordingly, the Commission must itself have complied with the PRA before it may enforce that information collection requirement under § 308 of the Communications Act.

2. Harmless error

Northeast argues that the Commission's temporary failure to adhere to the PRA was harmless as far as PortCell is concerned. The OMB issued a control number for the firm-financial-commitment regulation in 1990, which was after the information was collected from PortCell but before the Commission dismissed PortCell's application (in 1991) for failure to comply with the regulation. Northeast reminds us that the PRA "does not prevent the promulgation of a rule, only its enforcement." *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1405 (D.C. Cir. 1996).

Northeast's argument loses sight of the Congress's purpose in enacting the PRA—to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons." 44 U.S.C. § 3501(1). In order to fulfill that purpose, the PRA must protect a member of the public when the agency imposes the paperwork burden upon it, not merely when the agency relies upon the paperwork in making a decision, which

(as this case illustrates) can be years later. Therefore, an agency may not, having belatedly gotten OMB approval of an information collection requirement, punish a respondent for its faulty compliance while the collection was still unauthorized. Because § 22.917(b) lacked a control number when the Commission required that PortCell submit information about its financial commitment, the Commission could not punish PortCell for failing to submit the information it required.

3. Not a collection of information

The regulation in force at the time PortCell became the tentative selectee required that a cellular applicant "obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system and amend its application to so demonstrate." 47 C.F.R. § 22.917(b)(1) (1986). Northeast submits that this regulation is not a "collection of information" within the meaning of the PRA because it requires the tentative selectee not merely to provide information about but actually to obtain a firm financial commitment. The Commission, on the other hand, considers the regulation to be a collection of information because the selectee must provide the Commission with evidence of the commitment.

Clearly enough the regulation imposes both a substantive and a reporting requirement. The selectee must obtain a firm financial commitment as a precondition to receiving a license, and it must amend its application to demonstrate that it has obtained the commitment. The latter requirement is a collection of information; therefore, the Commission may not punish a selectee for failing to provide the information unless it has first obtained a valid OMB control number.

In the present case the letter of credit from NYNEX Credit that PortCell submitted in 1986 was "incomplete because it failed to provide all of the evidence required

by the regulation" and thus " 'failed to comply' with the requirement of the information collection." 11 FCC Rcd at 20007. The 1986 letter of credit did not, however, demonstrate that PortCell had failed to obtain the required firm financial commitment, and the Commission did not fault PortCell on that substantive ground. Therefore, this case involves PortCell's failure to comply with a collection of information that lacks an OMB control number and not, as Northeast would have it, PortCell's failure to fulfill an underlying substantive requirement. Accordingly, we have no occasion to decide whether the PRA prevents an agency from punishing a party for a failure to fulfill a substantive legal requirement that is brought to light only because that substantive requirement is also the subject of an information collection requirement.

C. Did the Commission Rely Upon Inapposite Information in Granting the License to PortCell?

The OMB regulations implementing the PRA require that where, as here,

> an agency has imposed a collection of information as a means for proving or satisfying a condition for the receipt of a benefit or the avoidance of a penalty, and the collection of information does not display a currently valid OMB control number . . . [the agency must] permit respondents to prove or satisfy the legal conditions in any other reasonable manner.

5 C.F.R. § 1320.6(c). Hence, the Commission appropriately allowed PortCell to amend its application in order to demonstrate that it had obtained the firm financial commitment that is a prerequisite to receiving a license to provide cellular service.

We note that the Commission disqualified PortCell for want of evidence that PortCell had obtained a firm financial commitment as of 1986, while PortCell's amended application demonstrates only that it had obtained a firm

financial commitment as of 1995; the amendment sheds no light upon what commitment, if any, PortCell had obtained in 1986. *Cf., e.g., Pontchartrain Broadcasting Co. v. FCC*, 15 F.3d 183, 184 (D.C. Cir. 1994) ("In cases involving amendment of an applicant's initial financial certification, the Commission generally requires that the applicant also demonstrate that it had a reasonable assurance of financing at the time that it made its initial certification." (citing *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603-04 (1991))). At oral argument Northeast responded to an inquiry from the court by arguing for the first time that the Commission erred in accepting PortCell's amendment because it failed to demonstrate that it had a firm financial commitment as of 1986. As the Commission correctly noted in its 1996 order, however, before the agency "Northeast [did] not oppose the amendment or argue that it is insufficient." 11 FCC Rcd at 20008. Because no one challenged the amendment as anachronous before the Commission, the agency did not have an opportunity to consider that charge. Therefore, the issue was neither preserved nor presented for our review, and we do not pass upon it. *Cf. United States v. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that court should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"); *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1360 (D.C. Cir. 1985) ("Such an ambush at this late stage cannot be allowed").

III. CONCLUSION

For the foregoing reasons we affirm the Commission's order rescinding the grant of the Portland, Maine Block B cellular license to Northeast, reinstating PortCell's application, and granting the license to PortCell. Accordingly,

we vacate our order of March 10, 1997 staying the Commission's order, and we dismiss as moot Saco River's challenges to the Commission's handling of its application for a cellular license.

It is so ordered.

APPENDIX B

[Filed Apr. 17, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1997

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.
and PORTLAND CELLULAR PARTNERSHIP,
Intervenors

Consolidated with 93-1423, 96-1439

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges.

ORDER

Upon consideration of the motion for stay of mandate, the responses thereto and of the replies, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

[Filed Mar. 19, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1997

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.
and PORTLAND CELLULAR PARTNERSHIP,
Intervenors

Consolidated with 93-1423, 96-1439

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges.

ORDER

Upon consideration of intervenor's petition for rehearing filed March 2, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

[Filed Mar. 19, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1997

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.
and PORTLAND CELLULAR PARTNERSHIP,
Intervenors

Consolidated with 93-1423, 96-1439

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of intervenor's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In re Applications of:

PORTLAND CELLULAR PARTNERSHIP) File No. 27414-CL-P-152-B-86

NORTHEAST CELLULAR TELEPHONE COMPANY, L. P.) File No. 27488-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Services on Frequency Block B, in Market 152, Portland, Maine

---

ORDER

Adopted: November 18, 1996;

Released: November 21, 1996

By the Commission:

I. INTRODUCTION

1. In this order, we reinstate *nunc pro tunc* and grant the application of Portland Cellular Partnership ("Port Cell") to provide Block B cellular service to the Portland, Maine, New England County Metropolitan Area ("NECMA"). In light of this action, we also rescind the grant of the application of Northeast Cellular Telephone Company, L. P. ("Northeast") to provide the same cellular service, and dismiss as moot Port Cell's petition for

reconsideration of the grant of that application. In addition, we grant interim operating authority to Northeast that will terminate ten days after Port Cell serves notice to avoid interruption of service to Northeast's customers.

II. BACKGROUND

2. This proceeding has a complicated and protracted history. Although the applications were filed ten years ago, and the Commission has issued four orders, there is still not a final grant in this proceeding.

3. Originally, there were five participants in the lottery for the wireline authorization in Portland. The applicants were selected in the following order: Seacoast Cellular, Inc. ("Seacoast"), Saco River Cellular, Inc. ("Saco River"), Community Services Telephone Company ("Community"), Northeast, and NYNEX Mobile Communications Company ("NYNEX"). As part of a prelottery partial settlement agreement, Seacoast substituted its application with the application of Port Cell.[1] Port Cell was then named the tentative selectee.[2]

4. Northeast and Saco River filed petitions against Port Cell alleging, *inter alia*, that Port Cell's application did not comply with Section 22.917(b)(1) of the Commission's Rules.[3] They claimed that a firm financial commitment letter provided by NYNEX Credit Company to Port Cell was inadequate. The staff rejected these arguments, and granted an authorization to Port Cell.[4] The

---

[1] At that time, the Port Cell partnership consisted of Seacoast (holding a 42 percent interest), NYNEX (48 percent), and Community (10 percent). Port Cell's ownership has since been divided equally among NYNEX, Seacoast, and Lewiston-Auburn Cellular.

[2] *See* Public Notice, Report No. CL-86-206A (released June 24, 1986).

[3] 47 C.F.R. 22.917(b)(1) (1986).

[4] *Portland Cellular Partnership*, 2 FCC Rcd 5586 (Mobile Serv. Div. 1987).

Commission affirmed the grant to Port Cell on different grounds. It held that Port Cell's application did not comply with Section 22.917(b)(1), but waived the required showing, stating that "based on our experience regarding NYNEX Mobile and NYNEX Corporation in other markets and other contexts, and materials on file in other proceedings of which we take official notice, we are quite confident that Port Cell (whose financing was arranged through NYNEX Mobile) is financially qualified." *Portland Cellular Partnership*, 4 FCC Rcd 2050, 2051 (1989) ("*Port Cell I*").

5. Northeast and Saco River appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. The Court ruled that the Commission's decision was arbitrary and capricious because it was not based on a rational waiver policy, and therefore reversed and remanded the case to the Commission. *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) ("*Northeast Cellular*"). The court instructed the Commission that "absent a finding" that certain financial information "was considered and used in formulating an articulable waiver standard at the time the waiver was granted, the FCC must disqualify Port Cell's application." *Id.* at 1167. The court also indicated that "given the record in this case, we cannot imagine any standard that would have justified a waiver. . . ." *Id.* at 1165. On remand, the Commission found that Port Cell had not met the Section 22.917(b)'s firm financial commitment requirement. *Portland Cellular Partnership*, 6 FCC Rcd 2283, 2283-84 (1991) ("*Port Cell II*"). It also found that Port Cell had provided the Commission with no standard that would support waiver of the financial qualifications requirement, and accordingly the Commission denied the waiver and dismissed the application.[5] *Id.* at 2284. To prevent the loss of competi-

[5] The application of the next ranked applicant, Saco River, was returned as defective because it had proposed a 39 dBu contour

tion and service in the Portland market, however, the Commission granted Port Cell interim operating authority. *Id.*

6. The Commission's staff then named Northeast as the tentative selectee.[6] Port Cell, Saco River, and Community all filed petitions to deny Northeast's application. In *Portland Cellular Partnership*, 8 FCC Rcd 4146 (1993) ("*Port Cell III*"), the Commission denied the petitions to deny and granted Northeast's application. The Commission reaffirmed its dismissal in *Port Cell II* of Port Cell's and Saco River's applications. In addition, it dismissed Port Cell's petition for reconsideration of the dismissal of its application in *Port Cell II*, which raised for the first time issues regarding the Paperwork Reduction Act ("PRA"),[7] because the petition was filed nearly a year after the statutory deadline for filing such a pleading. The Commission stated that it had no discretion to consider such a pleading.[8] *Port Cell III*, 8 FCC Rcd at 4146 n.4. Finally, the Commission modified Port Cell's interim authority to allow it to continue operation until Northeast was ready to commence service. *Id.* at 4152.

7. Port Cell and Community each timely filed petitions for reconsideration of *Port Cell III* regarding the grant of Northeast's application to serve Portland. Port Cell additionally filed a petition for further reconsideration of the

---

extension into the adjoining NECMA which was not *de minimis*. *See* 47 C.F.R. § 22.20 (1990). Saco River sought judicial review of this action. *Saco River Cellular, Inc. v. FCC*, No. 91-1248 (D.C. Cir. filed May 24, 1991) ("*Saco River*"). This case has been held in abeyance pending conclusion of these administrative proceedings.

[6] Public Notice, Report No. CL-9-39 (Mobile Serv. Div. released April 30, 1991).

[7] 44 U.S.C. §§ 3501-3520.

[8] Section 405 of the Communications Act of 1934, as amended, establishes a 30-day deadline for filing petitions for reconsideration. 47 U.S.C. § 405.

dismissal of its application, and a motion to stay that decision. In its motion for stay, Port Cell argued that the PRA precluded the Commission's actions. The staff denied the motion.[9] The D.C. Circuit also denied Port Cell's contemporaneous motion which raised similar arguments.[10]

8. In *Portland Cellular Partnership*, 9 FCC Rcd 3291 (1994) ("*Port Cell IV*"), the Commission affirmed its dismissal of Port Cell's petition for reconsideration as untimely. *Id.* at 3291-92. It found that Port Cell's failure to raise its PRA arguments in a timely manner imposed a heavy burden on the court, the Commission, and the other parties to this proceeding because resources were consumed litigating Port Cell's compliance with the financial qualifications rule and the related waiver issue. *Id.* at 3292. Moreover, the Commission found no countervailing public interest reason to reconsider its prior decision on its own motion, particularly in light of the court's instruction that it "must disqualify Port Cell's application" in the absence of certain financial information not present. *Id.* at 3292 n.3. Therefore, it denied the petition. The Commission also dismissed in part and denied in part Community's petition for reconsideration. *Id.* at 3292. Port Cell sought review and a stay pending review of

---

[9] *Portland Cellular Partnership*, 8 FCC Rcd 6213 (Com. Car. Bur. 1993).

[10] *Saco River Cellular, Inc. v. FCC*, No. 91-1248, *et al.* (D.C. Cir. Sept. 16, 1993) (construing motion for stay as petition for writ of mandamus and denying petition), *reh'g denied* (D.C. Cir. Nov. 24, 1993) ("Port Cell has failed to show that the Federal Communications Commission clearly usurped its power when it declined to consider Port Cell's untimely petition for reconsideration containing the Paperwork Reduction Act argument."). Port Cell aso unsuccessfully raised PRA arguments in *Portland Cellular Partnership v. United States*, Civ. Act. No. 94-61P-C (D. Me. June 6, 1994), *appeal voluntarily dismissed*, No. 94-1743 (1st Cir. July 28, 1994), in which the court dismissed for lack of jurisdiction Port Cell's motion for preliminary injunction seeking to enjoin on PRA grounds the Commission's termination of Port Cell's interim operation of the Portland cellular system.

Port Cell IV in the D.C. Circuit.[11] The court denied Port Cell's motion for stay and dismissed its petition for review as "incurably premature." *Saco River Cellular, Inc. v. FCC*, Nos. 91-1248, *et al.* (D.C. Cir. Sept. 16, 1994), *reh'g denied* (D.C. Cir. Dec. 9, 1994).

9. Two requests are before us: (1) a petition for reconsideration filed by Port Cell on July 2, 1993, requesting that Northeast's license be rescinded and that Northeast's application be designated for hearing on real-party-in-interest grounds; and (2) a motion for reinstatement filed by Port Cell on October 11, 1995, requesting that, under the Paperwork Reduction Act of 1995 ("PRA of 1995"),[12] Port Cell's application be reinstated and granted because the Commission did not receive prior approval from the Office of Management and Budget ("OMB") under the PRA for the firm financial commitment requirement that served as the basis for dismissal of Port Cell's application. In particular, Port Cell argued that new Section 3512 of the PRA of 1995 requires the Commission to consider its arguments even if they are otherwise untimely. Various responsive and additional pleadings and letters have been filed.[13] In addition, the

---

[11] *Portland Cellular Partnership v. FCC*, No. 94-1500 (D.C. Cir. filed July 7, 1994). The court consolidated the appeal with the pending appeal in *Saco River*.

[12] Pub. L. No. 104-13, 109 Stat. 163 (1995), *amending and recodifying* 44 U.S.C. §§ 3501-3520.

[13] The litigiousness of the parties in this proceeding has been staggering, and has unnecessarily complicated and prolonged this proceeding. Many of the pleadings and letters before us are unauthorized. Nevertheless, in order to avoid further disputes over our decision, even if not specifically referenced, we have reviewed the entire record filed prior to September 15, 1996, and we address all relevant arguments filed up to that date. We have not reviewed materials filed after September 15, 1996, because, if we did not impose a cut-off on reviewing unauthorized pleadings, given the litigiousness of the parties, resolution of this case would be even further delayed.

General Counsel requested the Office of Legal Counsel of the Department of Justice ("OLC") to provide its views on the proper interpretation of Section 3512 because of the "broad implications" of the issues raised in the proceeding, and because "the PRA is not within the Commission's core expertise."[14] OLC declined to provide an opinion based on its policy of not providing advice in the context of a pending adjudicatory proceeding.[15]

III. DISCUSSION

A. Propriety of Considering Port Cell's Arguments

10. We turn first to Port Cell's reinstatement request because our resolution of that request may moot Port Cell's reconsideration petition. As noted above, we have twice rejected as untimely Port Cell's attempts to raise PRA issues. The threshold issue before us is thus whether, as argued by Port Cell, passage of the PRA of 1995, which amended the prior PRA, requires us now to consider its arguments of alleged violations of the PRA. For the reasons discussed below, although we recognize the strong policy reasons not to do so, we conclude that, under the PRA of 1995, we are indeed required to consider Port Cell's PRA arguments at this late stage of the proceeding.

11. Prior to 1995, the "public protection" provision of the PRA, 44 U.S.C. § 3512, provided:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved . . . does not

---

[14] Letter from General Counsel William E. Kennard to Assistant Attorney General Walter Dellinger, OLC (Apr. 29, 1996).

[15] Letter from Deputy Assistant Attorney General Richard L. Shiffrin, OLC, to General Counsel Kennard (June 27, 1996).

> display a current control number assigned by the Director [of OMB].

12. Under this section, if an agency promulgates an information collection without OMB approval, "members of the public may ignore it without risk of penalty." *Dole v. United Steelworkers of America*, 494 U.S. 26, 40 (1990). The pre-1995 version of the PRA did not specifically indicate that Congress intended this "public protection" provision to override provisions of other statutes (or prudential considerations) requiring that arguments be raised in an administrative or judicial proceeding in a timely fashion, or to override the instructions to an agency in a judicial remand. Accordingly, in our prior decision, we took the view that PRA arguments need not be addressed if they were untimely under Section 405(a) of the Communications Act, 47 U.S.C. § 405(a),[16] especially where consideration would be inconsistent with the instructions of a court in a remand order. *See Port Cell IV*, 9 FCC Rcd at 3291-92 & n.3.

13. As Port Cell points out, however, the PRA of 1995 contains significant new language relevant to the timeliness of PRA arguments. After re-phrasing the prior Section 3512 as a new Secton 3512(a), Congress added the following new Section 3512(b) (emphasis added):

> The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise *at any time during the administrative process or judicial action applicable thereto.*

14. The legislative history of this provision reinforces the clear statutory language. Senator Roth, Chairman of the Senate Governmental Affairs Committee and co-sponsor of the PRA of 1995 in the Senate, observed

---

[16] Section 405(a) provides, in pertinent part: "A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."

> that the protection of Section 3512 may be raised at any time during the life of the matter. The protection cannot be waived. Failure to raise them at an early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.

141 CONG. REC. S5274-75 (Apr. 6, 1995). *See also* 141 CONG. REC. H4376 (Apr. 6, 1995) (statement of Rep. Clinger) (public protection provision permits the defense to be raised "at any time in an ongoing dispute").

15. Northeast argues that despite the "at any time" language of Section 3512(b), a PRA issue may still not be raised if raising it would be untimely under another statutory provision. Its basis for this argument is that while Section 3512(a) is prefaced by the phrase "notwithstanding any other provision of law," Section 3512(b) contains no such language. We find this argument unpersuasive. The provision that a PRA issue may be raised "at any time" would be rendered meaningless if the phrase "except as otherwise provided by law or judicial order" was engrafted onto that section. In any event, to the extent ambiguity exists on this point, the legislative history quoted above resolves it decisively. In light of the fact that the statute permits PRA issues to be raised "at any time" in an administrative or judicial proceeding, Northeast's arguments that consideration of the PRA arguments now would be inconsistent with Sections 402(h)[17] and 405(a) of the Communications Act are unavailing. Sec-

---

[17] Section 402(h) provides,

> In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

tions 3512(b) simply trumps Section 405(a) and, to the extent it might be relevant, Section 402(h).

16. We do not agree with Northeast that Port Cell is raising its PRA defense outside of the administrative process. Port Cell's petition for reconsideration is still pending before us, and therefore the administrative process for licensing and operating the cellular system to serve the Portland NECMA is ongoing.[18] Consequently, Port Cell's motion raising Section 3512 relates to an on-going administrative process. Northeast complains that interpreting Section 3512(b) in this manner "creates absolute administrative and judicial chaos and anarchy." But as the legislative history quoted above indicates, Congress deliberately devised a remedy enabling the public to raise PRA violations without limitation, so long as the administrative or judicial process in connection with a particular license or with a particular application continues.

17. The next question we must address is whether the new Section 3512(b) applies to cases pending at the time of the October 1, 1995, general effective date of the PRA of 1995.[19] While the statute itself does not explicitly address this question, the legislative history does, and makes clear that the new Section 3512(b) applies to pending cases. Specifically, when the House of Representatives adopted the Conference Report on the PRA of 1995, Representative Crapo, the original sponsor of Section 3512(b), asked, "is it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?" Representative Clinger, the floor manager for the PRA of 1995 in the House, replied, "Mr. Speaker, the gentleman is absolutely correct. As of October 1,

---

[18] Indeed, for this reason, the D.C. Circuit found Port Cell's appeal to be premature. *See* paragraph 8, *supra*.

[19] Pub. L. No. 104-13, § 4(a), 109 Stat. 185 (1995), *reprinted in* 44 U.S.C.A. § 3501 Historical and Statutory Notes ("Section 4(a)").

1995, the defense provided in section 3512 is available at any time in an ongoing dispute." [20]

18. Northeast nevertheless argues that Section 3512(b) is not effective as to this case because Section 4(c) of the PRA of 1995 permits information collections already approved by OMB and displaying a valid OMB control number to remain in effect until the collection was renewed or revised.[21] On its face, this provision has nothing to do with the issue of whether a party in a pending case can now raise at any time in the proceeding an argument that the agency illegally imposed a penalty on it for failing to comply with an unapproved information collection. Northeast claims the firm financial commitment requirement has a current control number, and, therefore, pursuant to Section 4(c), the PRA of 1995 is not effective as to Port Cell's case. We fail to see how that relates to the question of whether Port Cell can argue now that the requirements lacked a valid OMB control number at the time Port Cell failed to comply with the rule. Surely an agency cannot penalize someone for violating an information collection that lacked OMB approval at the time the information submission was required but that got OMB approval later. The legislative history quoted above confirms that Congress intended Section 3512 to go into effect at the same time as the PRA of 1995 generally went into effect, and that it should apply to proceedings that are pending on the effective date.

19. Our decision here does not impermissibly retroactively apply Section 3512 to Port Cell's aplication. Section 3512 simply applies a new procedural or jurisdictional rule; it permits the defense that the PRA was violated be raised "at any time." Changes in procedural or jurisdictional rules generally do not raise concerns about

---

[20] 141 CONG. REC. H4376 (Apr. 6, 1995) (statements of Reps. Crapo and Clinger).

[21] Pub. L. No. 104-13, § 4(c), 109 Stat. 185 (1995), *reprinted in* 44 U.S.C.A. § 3501 Historical and Statutory Notes.

retroactivity. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1502 (1994). Even if Section 3512 raised concerns of retroactivity, because of the "clear evidence of congressional intent" that it "should apply to cases arising before its enactment," any potential concerns about impermissible retroactivity are eliminated. *Id.* at 1491-93, 1496. *See also Scheidemann v. INS*, 83 F.3d 1517, 1521 (3d Cir. 1996) ("a court may determine congressional intent [of retroactivity] . . . from the statute's legislative history."). Thus we conclude that Section 3512 may validly be applied to Port Cell.

20. We next consider whether Section 402(h) of the Communications Act, 47 U.S.C. § 402(h), or the court's remand in *Northeast Cellular* precludes our consideration of Port Cell's PRA arguments. The court vacated our waiver of the financial qualification requirements for Port Cell and remanded the proceeding to us, and Section 402(h) requires us to give effect to the court's mandate. We are not waiving the financial qualification requirements for cellular licensees in contravention of the court's mandate. Instead, we are considering whether the financial qualification requirement regulation is valid and enforceable under the PRA. Section 402(h) does not restrict us from doing so. In any event, Section 3512 of the PRA prevents Port Cell from being penalized "notwithstanding any other law," and permits Port Cell to raise a violation of the PRA "at any time during the administrative process or judicial action." It thus overrides any restriction Section 402(h) might place on our consideration of PRA issues in a proceeding on remand from a court.

21. We also reject Northeast's argument that we may not grant the relief sought by Port Cell because to do so would nullify the judgment of *Northeast Cellular*, contrary to the constitutional separation of powers doctrine articulated in *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995) ("*Plaut*"). In *Plaut*, the Supreme Court held unconstitutional Section 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b), which required reinstatement

of cases previously dismissed by the courts because the Congress retroactively commanded reopening final judgments. This case is fundamentally different. In *Plaut*, the judicial proceedings had been dismissed; there was no remand and continuing administrative proceeding that would be subject to further judicial review. *Id.* at 1451. Here, the judgment in *Northeast Cellular* vacated the Commission's waiver of financial qualification requirements and remanded the case to the agency for a further decision that could be judicially reviewed. Further administrative proceedings ensued, and the Commission's dismissal of Port Cell's application is still subject to judicial review. The statute addressed in *Plaut* by its terms applied to cases that were final. Section 3512 by its terms applies only to cases in which the administrative or judicial processes are still pending.

22. In sum, we conclude that Port Cell may properly raise the PRA issue and invoke the provisions of Secton 3512.

B. OMB Approval of Section 22.917(b)

23. It is not disputed that the FCC had not obtained OMB approval for Section 22.917(b) at the time that Port Cell filed its application. Thus, unless no OMB approval was required, Port Cell cannot be penalized for its failure to comply with Section 22.917(b).

24. Section 22.917(b) required tentative cellular service selectees to provide us with evidence of a firm financial commitment. This requirement is an information collection under the PRA, yet no OMB approval was obtained for the version of Section 22.917(b) in effect before or at the time Port Cell's application was filed. In *Dana* and its progeny, we concluded that PRA review was required for financial qualification requirements in analogous regulations.[22] Similarly, Section 22.917(b) re-

[22] *Dana Communications, Ltd.*, 7 FCC Rcd 1878 (1992) ("*Dana*") (PRA approval by OMB for former Section 22.917(c) governing

quired PRA review by OMB. Northeast's arguments to the contrary lack merit. It does not matter that Section 22.917(b) was adopted in a rulemaking proceeding without notice and comment.[23] The PRA requires OMB clearance for all information collections, whether promulgated with or without a notice and comment rulemaking proceeding.[24] OMB's interpretations of the PRA, which are entitled to deference,[25] confirm that its "paperwork control functions necessarily extend to all reporting and recordkeeping requirements, however imposed."[26] Nor does Congress' use of the terms information collection "requests" and requirements" in the 1980 PRA support Northeast's position. OMB's interpretation of the PRA confirms that the use of the terms "request" and "requirement" in the 1980 PRA was meant only to distinguish between information collections contained in notice and comment rulemaking proceedings, and all other information collections, and that in either instance OMB clearance was required.[27] In sum, Section 22.917(b) required PRA review by OMB.

---

financial showings required but not obtained); *Kent S. Foster*, 7 FCC Rcd 7971, 7972 (1992) (*"Foster"*) (same); *Fair Oaks Cellular Partners*, 10 FCC Rcd 9980 (1995) (*"Fair Oaks"*) (same).

[23] *See Cellular Lottery Rulemaking*, 59 R.R.2d 407, 415 n.37 (1985).

[24] 44 U.S.C. 3504(h) (OMB clearance required for information collections promulgated in notice and comment rulemaking proceedings); 44 U.S.C. 3507 (OMB clearance required for all other information collections); 5 C.F.R. §§ 1302.3, 1320.4(a) (1983) (OMB rules implementing the PRA, indicating review required for all information collections regardless of how promulgated).

[25] OMB's interpretation is entitled to deference, as Congress has vested it with oversight of the PRA. *See* 44 U.S.C. §§ 3503, 3504(c).

[26] *Controlling Paperwork Burdens on the Public*, 47 Fed. Reg. 39515, 39517 (1982) (decision on proposed rules implementing the 1980 PRA). *See also id.* at 39516 and 39519; *Controlling Paperwork Burdens on the Public*, 48 Fed. Reg. 13666, 13668, 13680, 13681 (1983) (*"Final PRA Rules"*) (decision on final rules implementing 1980 PRA).

[27] *Final PRA Rules*, 48 Fed. Reg. at 13676.

25. Port Cell's financial qualification submission failed to set out the terms of the loan commitment, or submit evidence of the lender's determination that it had assessed the credit worthiness of the loan applicant, as required by Section 22.917(b). *Port Cell II*, 6 FCC Rcd at 2283. Accordingly, its application was dismissed. *Id.* at 2283-84. At the time of Port Cell's application, the financial qualification information collection had not been submitted to OMB for approval, and had not received OMB clearance or an OMB control number. Under Section 3512(a), Port Cell cannot be penalized for failing to comply with Section 22.917(b). The dismissal of its application is the sort of "penalty" precluded by Section 3512. *See* 44 U.S.C. § 3502(14); 5 C.F.R. § 1320.3(j) (1995).

26. There is no merit to Northeast's argument that Port Cell cannot be deemed to have "failed to comply" with the information collection because it filed financial commitment information pursuant to Section 22.917(b). Port Cell's financial commitment filing was incomplete because it failed to provide all of the evidence required by the regulation. It "failed to comply" with the requirements of the information collection, and thus Section 3512 is available as a defense. We similarly interpreted Section 3512 in *Dana, Foster*, and *Fair Oaks*. In those proceedings, as in Port Cell's case, we failed to obtain OMB clearance for the financial qualifications information collection, and the applications were dismissed because the applicants made financial showings but failed to establish adequate firm financial commitments to fund their proposed operations. Based on Section 3512, we reinstated those applications. Port Cell is entitled to no less.

27. In sum, Section 22.917(b) required OMB approval under the PRA, but at the time of Port Cell's application, such approval had not been received. Port Cell cannot be penalized for failing to comply with the firm financial commitment requirements. Its application should thus not be dismissed for this reason.

C. Port Cell's Qualifications

1. *Financial Qualifications*

28. Pursuant to OMB's regulations implementing the PRA, Port Cell has submitted an amendment to the financial portion of its application. Where an information collection requirement lacks required OMB approval, we must permit the applicant to provide or satisfy the legal conditions in any reasonable manner. 5 C.F.R. § 1320.5(b).[28] Northeast does not oppose the amendment or argue that it is insufficient. We accept Port Cell's amendment to its application, conclude that it meets the requirements of former Section 22.917(b), and find Port Cell to be financially qualified to be granted the license to serve the Portland NECMA.

2. *Ex Parte Allegations*

29. Northeast argues that Port Cell solicited an improper ex parte communication in violation of 47 C.F.R. § 1.1210, and thus is not qualified to be a licensee even if its application is reinstated and Port Cell is now found to meet the financial showing requirements. This allegation arises from Port Cell's correspondence with Senator William S. Cohen. On December 21, 1994, Port Cell's counsel wrote Senator Cohen to "bring to your attention a very troubling matter . . ."[29] After summarizing the facts of this case involving the PRA issue, the letter stated (*id.*):

> The FCC's refusal to address the issue of PRA compliance is patently unfair to PortCell, which had a growing business valued at over $30 million dollars, and which has operated in full compliance with FCC

---

[28] *See also Fair Oaks*, 10 FCC Rcd at 9982 & n.25; *Foster*, 7 FCC Rcd at 7972 n.10; *Dana*, 7 FCC Rcd at 1879.

[29] Letter from L. Andrew Tollin and William H. Boger to United States Senator William S. Cohen (Dec. 21, 1994).

> rules and policies. This is a clear case where an agency of the Federal government has ignored the intent of Congress in enacting the PRA. Furthermore, whatever questions the FCC might have had about PortCell's financial resources have been answered by its success as a growing concern over the last six years.
>
> We would appreciate a chance to discuss this situation with you and will call your office to arrange a convenient time.

30. Attached to the letter was a "Fact Sheet" further elaborating on the facts of the case and concluding:

> The FCC has thus terminated an operating business without confronting the question of whether such action is consistent with the PRA. In contrast to its actions in virtually every other case where it has discovered a PRA problem, PortCell has been forced off the air. The court has postponed PortCell's day in court indefinitely, leaving PortCell with little recourse but to seek Congressional help.

31. There is no indication that a meeting between Port Cell and Senator Cohen's office was ever arranged. Instead, on January 24, 1995, Senator Cohen forwarded Port Cell's letter to Chairman Hundt with a cover letter stating in part:

> Because of my desire to be responsive to all inquiries and communications, I would appreciate your consideration of the enclosed letter. I am particularly interested in your focusing on [Port Cell's counsel's] question as to whether the FCC complied with the Paperwork Reduction Act in adopting certain regulations.[30]

---

[30] Letter from Senator Cohen to Chairman Reed E. Hundt (Jan. 24, 1995).

32. Senator Cohen also wrote to Port Cell indicating in pertinent part:

> In order to be of assistance to your client [*i.e.*, Port Cell], I recently sent a letter to Reed Hundt, the Chairman of the FCC, to urge his prompt consideration of the matter, particularly focusing on your question as to whether the FCC complied with the Paperwork Reduction Act in adopting certain regulations.[31]

33. Because the letter from Senator Cohen to Chairman Hundt was not served on Northeast, and because it addressed the merits of the proceeding, it was an ex parte presentation. The Commission's Acting Secretary notified all parties of the correspondence, placed all of the correspondence in the public file, and informed the Senator that this was a restricted proceeding (in which ex parte presentations are prohibited).[32]

34. On July 12, 1996, the General Counsel and the Chief, Wireless Telecommunications Bureau, believing that further information regarding the circumstances of the correspondence might clarify matters, wrote to Port Cell seeking additional information on this issue.[33] Port Cell provided declarations by its attorneys and principals in response. These declarations stated in essence that Port Cell's principals had authorized the correspondence on the advice of counsel because Senator Cohen's committee would have jurisdiction over any legislation involving the PRA. Port Cell's attorney stated: ". . . I believed clarify-

---

[31] Letter from Senator Cohen to L. Andrew Tollin and William H. Boger (Jan. 27, 1995).

[32] Letter from Acting Secretary William F. Caton to Senator Cohen (Mar. 2, 1995). *See* 47 C.F.R. § 1.1208.

[33] Letter from General Counsel Kennard and Michele Farquhar, Chief, Wireless Telecommunications Bureau to L. Andrew Tollin (Jul. 12, 1996).

ing the remedial effect of the PRA through legislation was worth exploring."[34] They indicate that they intended to seek a meeting with Senator Cohen, deny that any other contacts with the Senator occurred, and state that they had no intention that Senator Cohen should intervene with the Commission or knowledge that he intended to do so.

35. Northeast asserts that Port Cell failed to answer completely the questions posed concerning contacts with Senator Cohen's office, leaving many questions unanswered. Northeast questions, for example, (1) why, if Port Cell intended to meet with Senator Cohen, no meeting was ever set up, and (2) why, after Port Cell discovered that Senator Cohen had contacted the Commission, it did not immediately notify the Commission and the other parties. Port Cell then provided further declarations from its principals and attorneys. These declarations indicate that during the holiday period Port Cell decided to let some time pass before following up its letter to Senator Cohen. The declarations also indicate that it did not serve Senator Cohen's letter on the other parties because it was not required to and that no harm was done because the Managing Director served the other parties.

36. The issue before us is whether Northeast has made a prima facie showing that Port Cell "solicited" or "encouraged" Senator Cohen to make an ex parte presentation to the Commission, in violation of 47 C.F.R. § 1.1210, and, in view of Port Cell's response, whether the evidence as a whole raises a substantial and material question of fact as to whether Port Cell solicited or encouraged such a presentation. *See Astroline Communications Company, Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (discussing the relevant standard). As Port Cell observes, the letter to Senator Cohen does not on its face ask the Senator to make a presentation to the Commission regarding Port Cell's application. Rather, it

---

[34] Declaration of L. Andrew Tollin (Jul. 26, 1996) at ¶ 3.

specifically asks for "a chance to discuss this situation with you." Sworn declarations by Port Cell's principals, who authorized the letter, and Port Cell's attorneys, who drafted it, confirm that the language quoted reflects their true intention in writing to the Senator—to seek a meeting regarding Congressional help through legislation. There is no direct evidence before us tending to refute either the plain language of the letter or the sworn declarations of the principals. Moreover, although Senator Cohen's action in referring a constituent's inquiry to the relevant government agency might not be wholly surprising in light of customary congressional practice, we cannot say that it is circumstantially improbable that a constituent asking for a meeting with an elected representative actually wants one, even if the constituent ultimately does not follow up on its desire for such a meeting. In addition, we agree with Port Cell that once it learned of Senator Cohen's letter, it was not required to serve the letter on the other parties. Nor was Port Cell required to notify the Commission of the letter.

37. This case, thus, differs from, for example, *Elkhart Telephone Co.*, 11 FCC Rcd 1165 (1996), in which a party requested Senator Kassebaum to seek expedition of a Commission proceeding, but included with this request a draft letter from the Senator to the Commission addressing the merits. The presence of the draft letter provided specific support for the inference that the party intended to suggest to the Senator that such a letter be sent, although the party did not explicitly request the Senator to do so. Here, by contrast, there is no such specific support for the allegation that Port Cell's letter was intended to provoke Senator Cohen's presentation to the Commission. There is only the speculation that Port Cell's actions could be so interpreted. Mere speculation, however, is insufficient to raise a substantial and material question of fact. *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 772-73 (D.C. Cir. 1981); *Fox Television Stations, Inc.*, 10 FCC

Rcd 8452, 8512 ¶ 147 (1995), *recon. denied*, 11 FCC Rcd 7773 (1996).

38. That having been said, it would nevertheless be preferable for parties communicating with their representatives about pending restricted proceedings to specifically inform them of the restricted ex parte status of the proceeding and the prohibition on ex parte presentations, thereby avoiding even inadvertently instigating an inappropriate solicitation. We strongly advise that in the future parties follow this practice.

3. *Abuse of Process Allegations*

39. Northeast also challenges Port Cell's fitness to be a licensee based on allegations that Port Cell offered to withhold from the Commission information concerning Northeast's qualifications to be a licensee if Northeast would settle this proceeding. Port Cell wrote to Northeast indicating that Port Cell's lawyers had prepared a memorandum that was "very destructive of the ability of Northeast to qualify for the license." The memorandum concerned evidence intended to provide further support for Port Cell's allegations to the Commission that Northeast lacked reasonable assurance of the availability of its transmitter site. Port Cell stated that it had instructed its lawyers not to file the evidence at the time and instead suggested a meeting.[35] Northeast responded by informing Port Cell that "such threats are inappropriate and contrary to Commission policy . . . ."[36] Port Cell subsequently filed the information with the Commission, and disclosed the correspondence. In *Port Cell III*, 8 FCC Rcd at 4149 n.18, the Commission denied the relief sought by Port Cell based on the information in question.

---

[35] Letter from John W. Connor to Timothy Hutchison (Sept. 19, 1991).

[36] Letter from Timothy D. Hutchison to John W. Connor (Oct. 18, 1991), *attaching* letter from Alan Y. Naftalin to Timothy D. Hutchison (Oct. 18, 1991).

40. Abuse of process occurs when an improper threat is made to divulge information and invoke the Commission's processes unless another party accedes to some demands.[37] It does not include the "threat" implicit in any failed settlement negotiation that, in the absence of a settlement, litigation will continue.[38] Here, Port Cell merely indicated that it possessed evidence that would lead to successful litigation if no settlement was reached. This is more comparable to *Spanish International*,[39] where the parties simply indicated they would continue to litigate the pending case, than *Gulf Coast*, where a party made improper threats that were not 'on any theory a legitimate part of the settlement negotiations."[40] We do not believe that Port Cell's behavior in the settlement context involved any improper threat, and it raises no substantial and material questions regarding Port Cell's qualifications.

41. Accordingly, for the reasons stated above, we find Port Cell fully qualified to be a licensee. We rescind the grant of the Block B Portland, Maine, cellular market to Northeast, and grant Port Cell's application.

D. Interim Operating Authority

42. When we rescinded Port Cell's original authorization, we granted it interim operating authority until Northeast was ready to begin providing service. *Port Cell III*, 8 FCC Rcd at 4152, *modifying Port Cell II*, 6 FCC Rcd at 2284 (originally granting interim operating authority for six months).[41] As we noted then, the public interest

---

[37] *E.g., Gulf Coast Communications, Inc.*, 81 F.C.C. 2d 499, 513 (Rev. Bd. 1981) (*"Gulf Coast"*), *recon. denied*, 88 F.C.C.2d 1033 (Rev. Bd. 1981), *rev. denied*, FCC 82-168 (Apr. 16, 1982).

[38] *Spanish International Communications Corp.*, 1 FCC Rcd 92, 95 n.1 (Rev. Bd. 1986) (*"Spanish International"*) (subsequent history omitted).

[39] *Id.*

[40] *Gulf Coast* at 513.

[41] *See also, e.g., La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233 (D.C. Cir. 1990).

requires interim service in this case in order to maintain a healthy competitive market in Portland and to continue uninterrupted service to Northeast's customers. *Port Cell II*, 6 FCC Rcd at 2284. Port Cell asks that Northeast be allowed to continue service on an interim basis but cease service on ten days' notice from Port Cell that Port Cell will recommence operations. We believe this approach best serves the public interest. Accordingly, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), we will grant Northeast interim operating authority and permit it to continue service until ten days after Port Cell notifies Northeast and the Commission that it is ready to recommence service.

E. Northeast's Qualifications

43. In light of our decision to reinstate and grant Port Cell's application, we need not address here the real-party-in-interest questions raised against Northeast. We will dismiss Port Cell's petition for reconsideration and related pleadings on this issue.

IV. ORDERING CLAUSES

44. IT IS ORDERED that leave for Portland Cellular Partnership and Northeast Cellular Telephone Co., L.P., to file any unauthorized or unrequested pleadings in this proceedings IS GRANTED, and Portland Cellular Partnership's motion to strike IS DENIED.

45. IT IS FURTHER ORDERED that Northeast Cellular Telephone Company's license to construct and operate a cellular system on Frequency B in the domestic public cellular radio telecommunications service to serve Portland, Maine, IS RESCINDED.

46. IT IS FURTHER ORDERED that the application of Portland Cellular Partnership to operate the Portland, Maine, cellular system IS REINSTATED *NUNC PRO TUNC*, Portland Cellular Partnership's amendment IS ACCEPTED, and the application, as amended, IS GRANTED.

47. IT IS FURTHER ORDERED that Northeast Cellular Telephone Company, L.P., IS GRANTED interim operating authority to operate the Portland, Maine, cellular system until ten days after Portland Cellular Partnership serves notice on Northeast Cellular Telephone Company and the Commission that it is ready to recommence operations.

48. IT IS FURTHER ORDERED that the Petition for Reconsideration, filed July 2, 1993, by Portland Cellular Partnership, and the Motion for Leave to File and Motion to Set Aside Grant and Designate for Hearing, filed March 10, 1994, by Portland Cellular Partnership, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM F. CATON
Acting Secretary

APPENDIX F

CONSTITUTIONAL AND STATUTORY APPENDIX

1. Article III of the U.S. Constitution provides, in pertinent part:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1.

2. Section 405(a) of title 47 of the United States Code provides:

> A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.

47 U.S.C. § 405(a).

3. Section 402(h) of title 47 of the United States Code provides:

> In the event that the court [to which an FCC order is appealed] shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

47 U.S.C. § 402(h).

4. Section 402(j) of title 47 of the United States Code provides:

> The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C. § 402(j).

5. The Paperwork Reduction Act Amendments of 1995, 44 U.S.C. § 3512, provides as follows:

> (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter [the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*] if
>
> (1) the collection of information does not display a valid control number assigned by the Director [of the Office of Management and Budget] in accordance with this chapter; . . .
>
> * * *
>
> (b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

Id. § 3512 (enacted on May 22, 1995 as Pub. L. No. 104-13, § 2).